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Negligence is the violation of a legal duty  
Nonfeasance is a failure to enter upon the bailment  
contract.

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In bailments for the benefit of the bailor only, the  
bailee must not receive beneficial use of the  
bailment

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A courier without luggage whose countenance  
is his passport = negotiable instrument

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For Sat. Mch. 5th. Lecture on "Interstate  
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# HAND-BOOK

ON THE

## LAW OF BAILMENTS AND CARRIERS

BY

WILLIAM B. HALE, LL. B.  
"1

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1896

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To  
A. B. DE F.  
To whose love and wise counsel  
I am deeply indebted.

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# PREFACE.

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This book is an attempt to present a clear and accurate statement of the law of bailments in such a form that its principles may be most readily grasped and retained. All the principles have been carefully and exhaustively stated, illustrated, and explained. No question has been "written through." Each has been squarely met, and where the decisions fail to furnish a satisfactory answer the author has not hesitated to state his own views. Great pains have been taken to use terms with consistency and precision, and to avoid the loose use of language, so fatal to any scientific, or even intelligible, treatment of any subject. At all times the author has kept in close touch with the decisions. He has had the leading cases on the subject before him while writing each section, and the law will frequently be found stated in the very language of the decisions. The citation of authorities, however, has not been confined to what are known as "leading cases"; on the contrary, the effort has been to make the citation of cases reasonably exhaustive and up to date, so that the lawyer or student may have the benefit of cases from his own state upon the questions involved.

To the eminent labors of Judge Story all subsequent writers on bailments are deeply indebted, and the writer acknowledges his indebtedness, especially in the branch of civil and foreign law.

To facilitate reference to any desired point, section numbers have been introduced at the top of the page, and in the black-letter paragraphs specific references have been given to the pages where each particular proposition is discussed. In this manner the entire book is practically cross-referenced, and the accessibility of its contents greatly increased.

In conclusion the author wishes to acknowledge much valuable assistance from Mr. Earl P. Hopkins, especially in the chapter on "Pledges."

W. B. H.

St. Paul, April 5, 1896.





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# HAND-BOOK

ON THE

## LAW OF BAILMENTS.

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### CHAPTER I.

#### IN GENERAL.

1. Definition.
2. General Principles Common to All Bailments.
  - (a) Subject must be Personalty.
  - (b) Delivery.
  - (c) Acceptance by Bailee.
  - (d) Competency of Parties.
  - (e) Title of Bailor.
  - (f) Right of Property in Bailor—Right to Sue.
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  5. Mandatum.
  6. Commodatum.
  7. Mutuum.
  8. Pignus.
  9. Locatio.
10. Classification with Reference to Benefit.

#### DEFINITION.

1. A bailment is a transfer of the possession of personal property, without a transfer of ownership, for the

accomplishment of a certain purpose, whereupon the property is to be redelivered, or delivered over to a third person (p. 3).

*Historical Outline.*

Little can be said with certainty as to the origin of bailments, or of the time when the subject first assumed a place of importance in the science of the law. Among the early writers upon English law may be seen occasional attempts to set forth some of the principles embraced in the theory of bailments.<sup>1</sup> Among these, Coke,<sup>2</sup> in his *Institutes*, devotes some space to a discussion of the liability of the bailee. Bracton also treated of the subject, but his efforts were mainly directed towards the application of the principles of the laws of the ancients to the jurisprudence of a country and of times to which they were obviously incapable of adaptation.

The first real attempt at reducing to order the law of bailments as recognized in English jurisprudence was made by Lord Holt in the celebrated case of *Coggs v. Bernard*,<sup>3</sup> during the reign of Queen Anne. The only real point in issue in this case was in regard to the liability of a gratuitous bailee specially undertaking the accomplishment of a certain purpose, and the endeavors of the learned judge to give definite shape and order to a subject whose future importance he foresaw, resulted in but little of practical value, save as the merest ground-work for future investigation and research.

It was from the labors of Sir William Jones that the subject began first to take definite form, and it is upon his "Essay"<sup>4</sup> that all subsequent works upon bailment have been founded. The "Essay" was, however, based to such an extent upon the Roman law as to detract much from its value. The treatise of Mr. Justice Story<sup>5</sup> was the first logical, connected, and reliable exposition of the modern law of bailments in such a form as to be readily grasped and understood. To these three authors is due almost entirely the state in which we

<sup>1</sup> Rolle, Abr. (1668) tit. "Bailment"; Broke, Abr. (1576).

<sup>2</sup> Coke, First Inst. 89a, 89b.

<sup>3</sup> (1703) *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith, Lead. Cas. (7th Am. Ed.) 369.

<sup>4</sup> Jones, Bailm. (1781).

<sup>5</sup> Story, Bailm. (1832).

now find the laws of bailments, and upon their work every subsequent writer must draw heavily in his treatment of the same subject.

"Bailment" is a word of Norman derivation, and contains the bare idea of delivery.<sup>6</sup> By our adoption of the term, we have endowed it with a much fuller and more comprehensive meaning; but, through all the various connections in which the word is used in the law, the principal and underlying idea is that of the old Norman "bailler,"—to deliver.

#### *Various Definitions.*

The writers upon the subject of bailments differ essentially with regard to the elements necessary to the constitution of a bailment;<sup>7</sup> and there are consequently nearly as many definitions as there are writers upon the subject. The greater number lay down the rule that, upon fulfillment of the bailment purpose, there must be a redelivery of the article; thus implying that such delivery must be to the party who has made the temporary transfer of the article. That this idea is incorrect is evident when one considers the numerous cases in which it is the intention of the bailor that the one to whom he intrusts the goods shall, in the performance of his duty, deliver them to a third person, specified by the bailor. Instances of this kind of bailments will be found hereafter, in the case of mandates, and also where goods are delivered to a carrier for transportation.

Bailment is defined by Sir William Jones as being a delivery of goods in trust, on a contract, express or implied, that the trust shall

<sup>6</sup> 2 Reeves, Hist. Eng. Law (Ed. 1814) p. 333; 6 Am. Law Rev. 42; 2 Bl. Comm. 451; Jones, Bailm. 90.

<sup>7</sup> When raw materials are delivered to a manufacturer, to be manufactured and returned, it is a bailment. *Foster v. Pettibone*, 7 N. Y. 433. A bailment takes place when any article of personalty is put by the owner into the hands of another for a special purpose, to be returned to the owner or to a third person when the object of the trust is accomplished. *State v. Chew Muck You* (Dec. 16, 1890) 20 Or. 215, 25 Pac. 355; citing *Krause v. Com.*, 93 Pa. St. 418; *Blsh. St. Crimes*, § 423. See, also, as to what constitutes a bailment, *Pribble v. Kent*, 10 Ind. 325; *La Farge v. Riekert*, 5 Wend. (N. Y.) 187; *Tuttle v. Campbell*, 74 Mich. 652, 42 N. W. 384; *Bohannon v. Springfield*, 9 Ala. 789; *Oakley v. State*, 40 Ala. 372; *Green v. Hollingsworth*, 5 Dana (Ky.) 173; *Newhall v. Paige*, 10 Gray, 366; *Dunlap v. Gleason*, 16 Mich. 158; *Wadsworth v. Alcott*, 6 N. Y. 64; *Poe v. Horne*, Busb. (N. C.) 398; *Henry v. Patterson*, 57 Pa. St. 346; *Furlow v. Gillan*, 19 Tex. 250.



be duly executed, and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or been performed.<sup>8</sup> In this definition, there is no intimation that there can be any termination of the bailment other than by a redelivery. According to Judge Story, a bailment is "a delivery of a thing in trust, for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust."<sup>9</sup> In Kent's Commentaries a bailment is said to be "a delivery of goods on trust, upon a contract, express or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered."<sup>10</sup> The fact that

<sup>8</sup> Jones, Bailm. 1.

<sup>9</sup> Story, Bailm. c. 1, § 2.

<sup>10</sup> 2 Kent, Comm. (4th Ed.) lect. 40, p. 558. In regard to this definition, Judge Story says: "Mr. Chancellor Kent, in his learned Commentaries, has expressed a doubt whether a consignment to a factor constitutes a case of bailment; and he says that, in the present work on bailments, the term is applied to cases in which no return or delivery or redelivery to the owner or his agent is contemplated. He then adds: 'But, I apprehend this is extending the definition of the term beyond the ordinary acceptation of it in the English law.' 2 Kent, Comm. lect. 40. I regret that I cannot concur in this opinion. According both to Lord Holt and Sir William Jones, a consignment to a factor for sale falls within the meaning of the term 'bailment'; and, indeed, it is difficult to perceive why it should not, if a bailment be a delivery for some special purpose. Lord Holt, in *Coggs v. Bernard*, 2 Ld. Raym. 917, 918, in enumerating the various classes of bailments, says: 'As to the fifth sort of bailments, viz. a delivery to carry or otherwise manage for a reward to be paid to the bailee, these cases are of two sorts,—either a delivery to one that exercises a public employment, or a delivery to a private person.' He then proceeds to state that of the first sort is the case of a common carrier, a common hoyman, a master of a ship, etc. He then adds: 'The second sort are bailies, factors, and such like. And, though a bailie is to have a reward for his management, yet he is only to do the best he can. And if he be robbed,' etc., 'it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn,' etc. And then, after stating the extent of his liability, he adds: 'The same law is of a factor.' Sir William Jones, speaking upon the subject of the different degrees of diligence required of different bailees, says: 'When a person who if he were wholly uninterested, would be a mandatary, undertakes for a reward to perform any work, he must be considered as bound still more strongly to use a degree of diligence adequate to the performance of it,' etc. 'This is the case of commissioners, factors, and bailiffs, when their undertak-



redelivery is not the sole method for the proper termination of a bailment is recognized by Mr. Schouler in his statement that a bailment is "a delivery of some chattel by one party to another, to be held according to the special purpose of the delivery, and to be returned or delivered over when that special purpose is accomplished."<sup>11</sup> In all of the foregoing definitions, however, one very essential requirement has been omitted, though it is generally embodied in their subsequent treatment of the subject. This is the fact that, in order that a delivery may constitute a bailment, there must be no transfer of the right of ownership.\* In some cases the bailee acquires a special property in the chattel, but the general ownership still remains in the bailor. When this right passes from him, there is no longer a bailment. The importance of this restriction will be seen when the distinction between a bailment and a sale is pointed out; and, in view of its importance, it has been thought best to embody it in the definition that a bailment is a transfer of the possession of personal property, without a transfer of ownership, for the accomplishment of a certain purpose, whereupon

ing lies in feausance, and not simply in custody.' Jones, Bailm. 98. Whether the delivery be for a reward, or without a reward, for custody, or for feausance, makes no difference as to the case being a bailment, and the persons to whom the delivery is made being bailees, in the strictest sense of the term. Indeed, persons to whom goods are delivered for sale (as factors are) are constantly treated in the old books as bailees. Thus, in Rolle, Abr. 'Accompt,' 118, l. 35, it is said: 'If a man bail goods to another to sell, and he sells them accordingly, the bailor ought to charge him as bailee, and not as receiver.' So, in 1 Rolle, Abr. 'Accompt,' 119, l. 25, it is said: 'If a man makes another the bailee of his wood, to put the same on sale, he ought to be charged as bailee, although he has not sold it.' S. P. Com. Dig. 'Accompt,' A, 3; 41 Edw. III. 3. So, in a recent case, receiving goods from another, upon an agreement to sell and account for them to the owner, or to return them as good as when taken, with interest, has been held to be a bailment, and not a sale. *Morss v. Stone*, 5 Barb. (N. Y.) 516. See, also, *Southcote's Case*, 4 Coke, 83, 84; 1 Bell, Comm. (4th Ed.) §§ 202, 407, 408; 1 Bell, Comm. (5th Ed.) pp. 259, 476; *Ersk. Inst. bk. 3, tit. 1, §§ 16, 17, 26; Id. tit. 3, §§ 31-39; 1 Stair, Inst. bk. 1, tit. 12, §§ 1, 9, 19;*" Story, Bailm. § 2, note.

<sup>11</sup> Schouler, Bailm. (2d Ed.) § 2.

\* "A bailment may be said to exist whenever the possession of a chattel is lawfully severed from its ownership, or from any right derived from and representing ownership." Hammond, Synopsis of Bailments.

the property is to be redelivered or delivered over to a third person. "The party first delivering the thing is the bailor; the recipient, upon whom rests the duty of a final return, or delivery over, is the bailee."<sup>12</sup>

*Bailment Distinguished from Sale.*

A sale has been defined as being "a transfer of the absolute or general property in a thing for a price in money";<sup>13</sup> and the difference between a sale and a bailment lies, to a great extent, in the fact that in a bailment no such absolute or general property in the thing passes, but only a special property passes to the bailee.<sup>14</sup> It is, furthermore, essential in the case of a bailment that the identical article which is the subject of the undertaking shall be returned to the bailor<sup>15</sup> when the object for which it was intrusted to the bailee shall have been completed, or else that it shall be delivered to the party specified by the bailor, delivery to whom formed a part of the bailment contract. According to Benjamin,<sup>16</sup> "one established test between a bailment and a sale is that when the identical thing delivered is to be returned, though, perhaps, in an altered form, it is a bailment, and the title is not changed; but when there is no obligation to return the specific article received, and the receiver is at liberty to return another thing, either in the same or some other form, or else to pay money, he becomes a purchaser; the title is changed; the transaction is a sale; and the property is at the receiver's risk. Therefore, where, by the true construction of the contract, \* \* \* the article delivered is to be returned either just as received or made into other goods, \* \* \* the transac-

<sup>12</sup> Schouler, *Bailm.* (2d Ed.) § 2.

<sup>13</sup> *Benj. Sales* (6th Am. Ed.) § 1; *Tiffany, Sales*, 1.

<sup>14</sup> *Bretz v. Diehl*, 117 Pa. St. 589; *Edward's Appeal*, 105 Pa. St. 103; *Dando v. Foulds*, 105 Pa. St. 74; *Enlow v. Klein*, 79 Pa. St. 488; *Rose v. Story*, 1 Pa. St. 190; *Wheeler & Wilson Manuf'g Co. v. Hell*, 115 Pa. St. 487, 6 Atl. 616.

<sup>15</sup> For an apparent exception in the case of a pledge of corporate stock, under which the identical certificates need not be returned, see post, p. 159.

<sup>16</sup> *Benj. Sales* (6th Am. Ed.) p. 5, note; and see cases there cited. The fact that the bailee agrees to pay a certain sum, if he does not return the property, does not, per se, convert the bailment into a sale. *Westcott v. Thompson*, 18 N. Y. 363.

tion is a bailment." According to Tiffany, "it is transfer of ownership which distinguishes a sale from a bailment. The general test of bailment or sale is whether or not it is the intention of the parties that the thing received shall be returned. If the identical thing is to be returned, though in altered form, \* \* \* the transaction is a bailment."<sup>17</sup> Mr. Schouler gives the following test: "If the

<sup>17</sup> Tiffany; Sales, p. 3; Pierce v. Schenck, 3 Hill (N. Y.) 28; Foster v. Pettibone, 7 N. Y. 433; Mansfield v. Converse, 8 Allen (Mass.) 182; Barker v. Roberts, 8 Greenl. (Me.) 79; Brown v. Hitchcock, 28 Vt. 452; Irons v. Kentner, 51 Iowa, 88, 50 N. W. 73. If, however, the identical thing is not to be returned, it is a sale or an exchange, according to the nature of the consideration. South Australian Ins. Co. v. Randell, L. R. 3 P. C. 101; Powder Co. v. Burkhardt, 97 U. S. 110, 116; Sturm v. Boker, 150 U. S. 312, 330, 14 Sup. Ct. 99; McCabe v. McKlnstry, 5 Dill. 509, Fed. Cas. No. 8,667; Ewing v. French, 1 Blackf. (Ind.) 354; Smith v. Clark, 21 Wend. (N. Y.) 83; Norton v. Woodruff, 2 N. Y. 153; Crosby v. Delaware & H. Canal Co., 119 N. Y. 334, 23 N. E. 736; Chase v. Washburn, 1 Ohio St. 244; Butterfield v. Lathrop, 71 Pa. St. 225; Andrews v. Richmond, 34 Hun, 20; Austin v. Seligman, 21 Blatchf. 507, 18 Fed. 519; Lyon v. Lenon, 106 Ind. 567, 7 N. E. 311; Marsh v. Titus, 3 Hun (N. Y.) 550; Kant v. Kessler, 114 Pa. St. 603, 7 Atl. 586; Balley v. Bensley, 87 Ill. 556; Mack v. Snell, 140 N. Y. 193, 35 N. E. 493.

When wheat is delivered to a miller, to be ground and flour returned therefor, the transaction is a bailment when the flour is to be made from the identical wheat delivered. Slaughter v. Green, 1 Rand (Va.) 3; Inglebright v. Hammond, 19 Ohio, 337. But, if the flour need not be made from the same wheat, there is no bailment; the title to the wheat vests in the miller, and he would be the one to suffer by its destruction. Hurd v. West, 7 Cow. (N. Y.) 752, note page 758; Smith v. Clark, 21 Wend. 83; Norton v. Woodruff, 2 N. Y. 153; Mallory v. Willis, 4 N. Y. 76, 81; Ewing v. French, 1 Blackf. 353; Buffon v. Merry, 3 Mason, 478, Fed. Cas. No. 2,112; Chase v. Washburn, 1 Ohio St. 251 (distinguishing Slaughter v. Green and Inglebright v. Hammond, supra); Jones v. Kemp, 49 Mich. 9, 12 N. W. 890. Contra, Seymour v. Brown, 19 Johns. 44 (overruled). The same rule has been applied to the refining of jeweler's sweepings, Austin v. Seligman, 21 Blatchf. 506, 18 Fed. 519; to the sawing of logs into boards, Barker v. Roberts, 8 Greenl. (Me.) 79; Pierce v. Schenck, 3 Hill (N. Y.) 28; to the delivery of hides to be tanned, Jenkins v. Eichelberger, 4 Watts (Pa.) 121. But see Weir Plow Co. v. Porter, 82 Mo. 23; Caldwell v. Hall, 60 Miss. 330.

Wheat and other grain are often stored in elevators where the property of a number of persons is placed in the same bins, and the elevator owner has a right, by express contract or by custom, to sell grain from the common mass, his only obligation being to return grain of the same grade as that received. Some cases hold such a transaction to be a sale, in conformity with the

terms of the undertaking contemplate returning money instead, or any equivalent, the transaction would constitute, not a bailment, but a sale."<sup>19</sup> It will be seen that the same idea underlies these and other distinctions between the two transactions; that, as was first stated, in a sale the owner of goods parts with the general property in them, and the right of ownership is transferred to the buyer, while in a bailment no such right of ownership is transferred by the bailor's delivery of the thing to the bailee, the only right which the latter can acquire being a special property in the thing.<sup>19</sup>

### *Mutuum.*

In this connection may be noticed the "mutuum" of the Roman law, under which title were comprised those deliveries of goods which were expected to be consumed by the recipient, and for which other goods of the same kind were to be given to the owner in return. Under the common law, as will be seen from the definitions just quoted, such a transaction would be considered as virtually constituting a sale.<sup>20</sup>

principles laid down above. Other cases treat it as a bailment. The following hold it a sale: *Chase v. Washburn*, 1 Ohio St. 244; *Lonergan v. Stewart*, 55 Ill. 44; *Richardson v. Olmstead*, 74 Ill. 213; *Bailey v. Bensley*, 87 Ill. 556; *Johnston v. Browne*, 37 Iowa, 200; *Carlisle v. Wallace*, 12 Ind. 252; *Rahilly v. Wilson*, 3 Dill. 420, Fed. Cas. No. 11,532; *Fishback v. Van Dusen*, 33 Minn. 111, 22 N. W. 244; *South Australian Ins. Co. v. Randell*, 6 Moore, P. C. (N. S.) 341; *Woodward v. Semans*, 125 Ind. 330, 25 N. E. 444; or that it is a sale as soon as disposed of by the bailee, *Nelson v. Brown*, 44 Iowa, 455. As holding the transaction a bailment, see *Sexton v. Graham*, 53 Iowa, 181, 4 N. W. 1090; *Nelson v. Brown*, 53 Iowa, 555, 5 N. W. 719; *Ledyard v. Hibbard*, 48 Mich. 421, 12 N. W. 637; *Andrews v. Richmond*, 34 Hun (N. Y.) 20; *Rice v. Nixon*, 97 Ind. 97; *Bottenberg v. Nixon*, 97 Ind. 106; *Irons v. Kentner*, 51 Iowa, 88, 50 N. W. 73. The several owners, it is held, become tenants in common of the whole mass of grain. *Sexton v. Graham*, supra; *Andrews v. Richmond*, supra; *Arthur v. Chicago, R. I. & P. R. Co.*, 61 Iowa, 648, 17 N. W. 24; *Dole v. Olmstead*, 36 Ill. 150. For a discussion of the question and review of the cases, see article on "Grain Elevators" in 6 Am. Law Rev. 450. And see post, p. 244.

<sup>19</sup> Schouler, *Ballm.* (2d. Ed.) § 6.

<sup>20</sup> A vendor of goods may become a bailee by agreeing by the same contract to store them. *Oakley v. State*, 40 Ala. 372. But no bailment arises by implication from a sale on a void consideration. *Green v. Hollingsworth*, 5 Dana (Ky.) 173.

<sup>20</sup> *Lonergan v. Stewart*, 55 Ill. 44; *McKay v. Hamblin*, 40 Miss. 472; Fos-

*Bailment with Option to Purchase.*

A delivery in the nature of a bailment may be made with the understanding that, upon certain conditions, the thing delivered shall become the property of the bailee; and, when he has performed such conditions, the bailment relation terminates, and a sale is thereby constituted. Such a transaction would be a bailment with an option to purchase.<sup>21</sup>

ter v. Pettibone, 7 N. Y. 433; Prichett v. Cook, 62 Pa. St. 193; Powder Co. v. Burkhardt, 97 U. S. 110. And see cases cited in the preceding notes. As to the use of the terms "borrower" and "lender," in mutuum transactions, see Fosdick v. Greene, 27 Ohio St. 484. "A deposit differs from what is called in the civil law a 'mutuum,' for in the latter case the identical thing lent is not to be returned, but another thing of the same kind, quality, nature, or value. Thus, for example, where the loan is of money, wine, or other things that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity, it is a mutuum. In a mutuum the property passes immediately from the mutuant or lender to the mutuary or borrower, and the identical thing lent cannot be recovered or redemanded. Indeed, it is said in the civil law to derive its name from this very circumstance." Story, Ballm. § 47. In regard to the Roman mutuum, Gaius says: "This chiefly relates to things which are estimated by weight, number, or measure, such as money, wine, oil, corn, bronze, silver, gold. We transfer our property in these, on condition that the receiver shall transfer back to us at a future time, not the same things, but other things of the same nature; wherefore this contract is called 'mutuum,' because thereby meum becomes tuum." Poste Gaius, III. § 90. If goods are taken with an option to purchase, the transaction is a bailment; otherwise if there is a sale with the condition that the vendee may return the goods if they are not satisfactory. Hunt v. Wyman, 100 Mass. 198; Chamberlain v. Smith, 44 Pa. St. 431. But where the title passes with a right in the vendor to rescind for cause, it is a conditional sale. Bryant v. Crosby, 36 Me. 562. "If the transaction was a conditional sale, whether in form or in substance, we have held the title to be in the vendee, and therefore subject to the claims of his creditors; but if it was a bailment, we have held the title to be in the bailor, and not subject to any claims of the vendee's creditors." Brown v. Billington, 163 Pa. St. 76, 29 Atl. 904, 905. See, also, Monjo v. French, 163 Pa. St. 107, 29 Atl. 907; Ferguson v. Lauterstein, 160 Pa. St. 427, 28 Atl. 852.

<sup>21</sup> Carpenter v. Griffin, 9 Paige, Ch. (N. Y.) 310; Sargent v. Gile, 8 N. H. 325. Where two colts were delivered for keeping, and to be sold by bailee if possible, if not to be returned, the contract was held to be one of bailment. Middleton v. Stone, 111 Pa. St. 589, 4 Atl. 523. A conditional vendee of personal property in his possession sold it unconditionally before the time limited in the contract of purchase. It was held that this terminated the



## GENERAL PRINCIPLES COMMON TO ALL BAILMENTS.

2. The rights and liabilities of the parties to a bailment are primarily determined by the contract and bailment purpose. The following principles, however, are common to all classes of bailments:
- (a) The subject of the bailment must be personalty (p. 11).
  - (b) There must be a delivery, actual or constructive, of the property (p. 12).
  - (c) There must be a voluntary acceptance by the bailee (p. 13).
  - (d) There must be competent parties (p. 16).
  - (e) Possession by the bailor is sufficient title to support a bailment (p. 20).
  - (f) The right of property remains in the bailor, and he may maintain an action to protect it (p. 21).
  - (g) The bailee is estopped from disputing that the bailor had title at the time the goods were delivered (p. 22).
  - (h) The bailor must not expose the bailee to danger without warning (p. 23).
  - (i) The bailee must exercise due care (p. 23).
  - (j) The parties may enlarge or diminish their liability by special contract, provided—
    - (1) The contract is not in violation of law or against public policy; and

bailment, and the vendor might reclaim the property at any time after such sale and delivery. *King v. Bates*, 57 N. H. 446; *Farrant v. Thompson*, 2 Dowl. & R. 1. It may be provided that the title shall remain in the bailor, and thus a bailment be established, with a further provision giving the bailee an option to consume the property. Until the option is exercised, the transaction remains a bailment. *Armington v. Houston*, 38 Vt. 448. So it has been held a bailment in a case where a sum of money was deposited with a merchant, he occasionally withdrawing small amounts to make change. *Caldwell v. Hall*, 60 Miss. 330. So an option may reside in the bailor to make the transaction a sale; but, unless the option is exercised, the bailment relation will continue. *Weir Plow Co. v. Porter*, 82 Mo. 23.

- (2) The liability of the bailee is not to be enlarged or restricted by words of doubtful import (p. 27).
- (k) The bailee must exercise perfect good faith at all times. He is always liable for his positive wrong or fraud (p. 28).
- (1) The bailee must deliver up the property uninjured at the termination of the bailment, or excuse his inability to do so (p. 30).

*Subject must be Personalty.*

Personal property only may be the subject of a bailment. There can be no bailment of real property.<sup>22</sup> By the civil law, only corporeal personalty might be bailed, on the ground that it alone admitted of the actual delivery requisite to constitute a bailment.<sup>23</sup> At the common law, however, not only corporeal personalty is bailable, but also any incorporeal personalty, evidences of title to which or vouchers for which may be transferred.<sup>24</sup> Thus, debts or choses in action may at the present time form the subject of a bailment.<sup>25</sup>

While, technically speaking, there may not be a bailment of a thing not yet in existence, yet this result is practically attained, as will be seen in the case of pledges, by a contract for a pledge of the thing; and the pledgee's right will immediately attach when the thing actually comes into existence,<sup>26</sup> unless, as will be seen,<sup>27</sup> rights of third persons have intervened.

<sup>22</sup> A bailment can exist only as to a chattel, not as to realty. *Williams v. Jones*, 3 Hurl. & C. 256; *Coupledike v. Coupledike*, Cro. Jac. 39. See post, p. 151, note 251, for the civil-law pledge of real property called "Antichresis." And cf. *Dewey v. Bowman*, 8 Cal. 145.

<sup>23</sup> Story, Bailm. §§ 51, 373; Schouler, Bailm. (2d Ed.) § 31.

<sup>24</sup> *McLean v. Walker*, 10 Johns. (N. Y.) 471; *Jarvis v. Rogers*, 15 Mass. 389; *White v. Phelps*, 14 Minn. 27 (Gil. 21); *Appleton v. Donaldson*, 3 Pa. St. 381; *Loomis v. Stave*, 72 Ill. 623.

<sup>25</sup> *Hanna v. Holton*, 78 Pa. St. 334; *Walker v. Staples*, 5 Allen (Mass.) 34; *Shaw v. Wilshire*, 65 Me. 485; *Hudson v. Wilkinson*, 45 Tex. 444; *In re Rawson*, 2 Low. 519, Fed. Cas. No. 4,837.

<sup>26</sup> Story, Bailm. § 294. Thus, in *Macomber v. Parker*, 14 Pick. (Mass.) 497, a brickmaker agreed with the lessees of a brickyard in which he was

<sup>27</sup> Post, p. 119.

*Delivery.*

Delivery is absolutely essential to a bailment, and the delivery marks the real inception of the bailment. Where there is no delivery, there is no bailment.<sup>28</sup> Delivery may be either actual or constructive. An actual delivery is where there is an actual transfer of the possession of the thing from the bailor to the bailee. A constructive delivery arises where there is no actual change of possession, but when, from the circumstances of the case, an intention on the part of the person in possession to thereafter act as bailee for another may be implied.<sup>29</sup> Thus, a vendor holding goods after a sale does so as a bailee for the vendee.<sup>30</sup> Other instances of constructive delivery are seen where a creditor holding a pledge assents, after the debt has been paid, to hold it for the benefit of his debtor; or where a thing has been hired, and the purpose of the hiring has been executed, but the thing remains with the bailee, with the lender's assent. In each case a new bailment—one for the sole benefit of the bailor, instead of one for their mutual benefit—is created, though there is no actual new delivery or change of possession. The retention of possession after the termination of the former bailment is a sufficient constructive delivery.<sup>31</sup> A sufficient delivery may be made to a servant or an agent of the bailee.<sup>32</sup>

manufacturing bricks that they should hold the bricks to be made as security for money advanced by them. It was held that the bricks were pledged as fast as made. See, also, *Cushman v. Hayes*, 46 Ill. 145; *Smithurst v. Edmunds*, 14 N. J. Eq. 408.

<sup>28</sup> Schouler, *Bailm.* §§ 21, 32. "A mere contract where the thing has never really or constructively been delivered, does not amount to a deposit. But the delivery, both by our law and the civil law, is complete, whether given personally by the bailor, or by his order or approbation, when and as soon as the thing is received by the bailee, or by another for him, with his privity and approbation. When it be received by another person it must clearly appear that the delivery is not only on his own account but is on account of the party who is charged as bailee." Story, *Bailm.* § 55.

<sup>29</sup> Story, *Bailm.* § 55; *Whitaker v. Sumner*, 20 Pick. (Mass.) 399; *Tuxworth v. Moore*, 9 Pick. (Mass.) 346. The property may be regarded as in bailee's possession, without any actual removal, if it passes under bailee's exclusive control. *Dillenback v. Jerome*, 7 Cow. 294; *Blake v. Kimball*, 106 Mass. 115.

<sup>30</sup> *Oakley v. State*, 40 Ala. 372.

<sup>31</sup> *Macomber v. Parker*, 14 Pick. (Mass.) 497, 509.

<sup>32</sup> *City Bank of New Haven v. Perkins*, 29 N. Y. 544; *Brown v. Warren*,



*Acceptance by Bailee—Whether Bailment is Founded on Contract.*

The statement that a bailment is a delivery upon a contract, express or implied, is open to criticism. It is true that in most instances a bailment is founded on contract. Wherever there is a voluntary delivery of the thing in question, there is a contract, though it may be only to return the property when demanded. But in many cases the law, from considerations of public policy, imposes the liability of a bailee on one who has come into possession of another's property without private agreement. Liability cannot be thrust upon one without his knowledge or consent, but, where one knowingly holds possession of another's property, he is liable as bailee. Thus, where one finds,<sup>33</sup> steals, or converts property, he is liable as a bailee.<sup>34</sup> Of course, it may be said that in this class of cases the law will imply a contract to return the property, and the wrongdoer would be estopped to deny it. But there is, in fact, no contract. "If there is no agreement, there can be no true contract.

43 N. H. 430; *Boynton v. Payrow*, 67 Me. 587; *McCready v. Haslock*, 3 Tenn. Ch. 13; *Lloyd v. Barden*, 3 Strobb. (S. C.) 343. One holding as servant for another is not bailee. *Com. v. Morse*, 14 Mass. 217; *Dillenback v. Jerome*, 7 Cow. 294; *Ludden v. Leavitt*, 9 Mass. 104; *Warren v. Leland*, Id. 264; *Waterman v. Robinson*, 5 Mass. 302.

<sup>33</sup> One who finds a thing is not compelled to assume its custody; but, if he voluntarily does so, he will be held by the law to be a depositary, and must exercise the care due from such a bailee. In *Cory v. Little*, 6 N. H. 213, it was held that one who finds a horse wrongfully in his field may turn it into the highway; and, if it stray away, he will not be responsible for it. In *Vandrink v. Archer*, 1 Leon. 221, 223, it was said by Anderson, J., that, "when a man comes to goods by trover, there is not any doubt but by law he hath liberty to take possession of them. But he cannot abuse them, kill them, or convert them to his own use, or make any profit of them; and, if he do, it is great reason that he be answerable for the same. But if he lose such goods afterwards, or they be taken from him, then he shall not be charged; for he is not bound to keep them." In *Isaack v. Clark*, Lord Coke said: "If a man finds goods, an action on the case lies for his ill and negligent keeping of them, but not trover or conversion, because this is but a nonfeasance." According to St. Germain (Doct. & Stud. Dial. 2, c. 38), "if a man finds goods of another, if they be after hurt or lost by willful negligence, he shall be charged to the owner. But, if they be lost by other casualty, \* \* \* I think he be discharged." As to this point, see *Dougherty v. Posegate*, 3 Iowa, 88; *Merry v. Green*, 7 Mees. & W. 623, 631; *People v. Cogdell*, 1 Hill (N. Y.) 94; *People v. Anderson*, 14 Johns. (N. Y.) 294.

<sup>34</sup> *Newhall v. Paige*, 10 Gray (Mass.) 366.

There may be an obligation, but, unless this obligation is imposed by the free consent of the parties, the obligation is not a contractual obligation. You may call it a 'contract,' as you may call black 'white,' but calling it so cannot make it a contract."<sup>36</sup>

*No (bailment) unless bailed knowingly it*  
 Acceptance may be actual or constructive.<sup>37</sup> Until there is something to show bailment notice, or knowledge, there is no bailment. The bailee must know that he is a bailee.<sup>38</sup> Where property comes into one's possession without his knowledge, he is in no sense a bailee until he learns of the possession. After he acquires knowledge of it, he is a quasi or constructive bailee. Public policy imposes upon him the obligation of good faith in dealing with the goods. Thus, where a man buys goods in a store, and puts them in another's wagon in the street, and the latter drives away with them, after he acquires knowledge of their presence, he is a quasi bailee, and must exercise good faith. It may be safely said that wherever possession of a thing is knowingly acquired, unaccompanied by the right of ownership, a bailment relation is established, and the person in possession holds the thing acquired simply as a bailee.<sup>39</sup> The delivery is the keynote of the whole transaction.<sup>40</sup> It is the inception of the bailment, and may be either actual or constructive, as where a vendor retains possession after a sale.<sup>41</sup> But one cannot be made a bailee against his will.<sup>42</sup>

<sup>36</sup> Clark, Cont. 752.

<sup>37</sup> Rodgers v. Stophel, 32 Pa. St. 111.

<sup>38</sup> Where goods are placed in a carrier's possession without his knowledge or consent, there can be no contract of bailment. Where one checked his trunk on a railway as baggage, paying no compensation therefor except his fare as a passenger, and giving no notice that it contained valuable and costly merchandise, it was held that the want of fair dealing on his part was a full answer to any action upon any implied contract of bailment for hire. Michigan Cent. R. Co. v. Carrow, 73 Ill. 348.

<sup>39</sup> Schouler, Bailm. (2d Ed.) § 3; Wolf v. Shannon, 50 Ill. App. 396; Jones v. Maxwell, 1 Lack. Leg. N. 191.

<sup>40</sup> Schouler, Bailm. (2d Ed.) §§ 21, 34, 71.

<sup>41</sup> See, also, Benj. Sales, bk. 2, c. 3; Bishop v. Shillito, 2 Barn. & Ald. 329, note; Harrington v. King, 121 Mass. 269; King v. Bates, 57 N. H. 446. As to the effect of a conditional sale on credit, reserving ownership in the vendor pending the payment, see Brunswick & Balke Co. v. Hoover, 95 Pa. St. 508; Stadtfeld v. Huntsman, 92 Pa. St. 53; ante, p. 9.

<sup>42</sup> Lloyd v. Bank, 15 Pa. St. 172; Cory v. Little, 6 N. H. 213. But cf. Leavy v. Kinsella, 39 Conn. 50.

*Same—Consideration.*

The objection that, in cases of bailments for the sole benefit of the bailor, there is no consideration for a contractual liability on the part of the bailee, is more fanciful than real.<sup>43</sup> A detriment, or parting with a present right, or delaying the present use of a right, is a sufficient consideration to support a contract by the promisor, although the promisor derives no benefit from it. In the case of a bailment, the yielding up of the bailor's possession, custody, and care of the thing to the bailee, upon the faith of his engagement or promise to redeliver it,<sup>44</sup> is a sufficient consideration. The bailee's assumption of the undertaking has, perhaps, prevented the selection of one better fitted to execute it.<sup>45</sup>

*Same—Constructive Bailees.*

It is not necessary that possession shall have been obtained by the will of the owner, or with the intention of holding as bailee, though the great majority of bailments with which we are concerned are founded on mutual agreement. One may become a constructive bailee without any agreement between the parties;<sup>46</sup> as, for in-

<sup>43</sup> Schouler, *Bailm.* (2d Ed.) § 9.

<sup>44</sup> It was held by Sir James Mansfield in *Mills v. Graham*, 4 Bos. & P. 140, 145, that "a bailment of goods to be redelivered imports an agreement to redeliver; all special bailments import a contract to redeliver when the purpose for which the goods were deposited is answered." And see, generally, *Clark v. Gaylord*, 24 Conn. 484; *McCauley v. Davidson*, 10 Minn. 418 (Gil. 335); *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Newhall v. Paige*, 10 Gray (Mass.) 366; *Mariner v. Smith*, 5 Heisk. (Tenn.) 203.

<sup>45</sup> Schouler, *Bailm.* § 34; *Balfe v. West*, 13 C. B. 466, 472, and cases cited; *Giles v. Bradley*, 2 Johns. Cas. 253; *Orser v. Storms*, 9 Cow. (N. Y.) 687; *Roulston v. McClelland*, 2 E. D. Smith (N. Y.) 60. A bailment of personal property constitutes a valid consideration for a promise to return it. *Clark v. Gaylord*, 24 Conn. 484.

<sup>46</sup> Schouler, *Bailm.* (2d Ed.) § 2. "The obligation of the bailee may arise by implied contract, as well as express agreement. Thus, a finder of a lost chattel or chose in action may become a bailee of it by the act of finding and keeping it in custody. And so, too, is the recipient of a chattel or chose in action, either directly from the hands of the absolute owner, or through the intervention of a private agency, such as a manager, or a public agency, such as a common carrier or the government mails. Hence this character of bailee, with this special property in the thing, may arise without any express agreement to receive and to hold for a particular purpose. It may

stance, in the case of an officer seizing goods under process,<sup>47</sup> or, as already stated, when one steals or converts another's property. One who negligently receives goods addressed to another is liable as bailee for the owner.<sup>48</sup> Where property comes into the possession of a public officer by reason of his official position, although it be not his duty by law to receive it, he will be considered a bailee, and must exercise ordinary care towards the property.<sup>49</sup> The finder of goods is, in the eyes of the law, constituted a bailee for the owner, and therefore responsible for their safe-keeping.<sup>50</sup>

*Competency of Parties.*

*End Sat Jan 4th.*

In most instances, bailments are created by express contract; and, when this is so, the parties must, of course, be capable of contracting, or no liability will arise upon the bailment contract. Here the ordinary rules as to contractual capacity apply.<sup>51</sup> Infants,<sup>52</sup> persons non compos,<sup>53</sup> and married women<sup>54</sup> are under the same disabil-

arise from the bare fact of the thing coming into the actual possession and control of a person fortuitously, or by mistake as to the duty or ability of the recipient to effect the purpose contemplated by the absolute owner." Folger, J., in *Phelps v. People*, 72 N. Y. 334, 357.

<sup>47</sup> *Phillips v. Bridge*, 11 Mass. 242; *Tyler v. Ulmer*, 12 Mass. 163; *Blake v. Kimball*, 106 Mass. 115, 116; *Parrott v. Dearborn*, 104 Mass. 104; *Jenner v. Joliffe*, 6 Johns. (N. Y.) 9; *Burke v. Trevitt*, 1 Mason, 96, 100, Fed. Cas. No. 2,163.

<sup>48</sup> *Newhall v. Paige*, 10 Gray (Mass.) 366.

<sup>49</sup> So, where a draft comes to the office of a state officer in the regular course of business, and is received by a subordinate appointed by the officer, and removable at his pleasure, and whom he has permitted to receive such articles, the officer becomes a bailee of the draft. *Phelps v. People*, 72 N. Y. 334; *Witowski v. Brennan*, 41 N. Y. Super. Ct. 284; *Cross v. Brown*, 41 N. H. 283; *Mott v. Pettit*, 1 N. J. Law, 344. Upon the dissolution of an attachment, the officer holding possession of the goods becomes a bailee for the owner. *State v. Fitzpatrick*, 64 Mo. 185.

<sup>50</sup> See ante, p. 13.

<sup>51</sup> *Clark*, Cont. 211; *Anson*, Cont. c. 3.

<sup>52</sup> *Holmes v. Rice*, 45 Mich. 142, 7 N. W. 772; *Harner v. Dipple*, 31 Ohio St. 72; *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Owen v. Long*, 112 Mass. 403; *Fetrow v. Wiseman*, 40 Ind. 148.

<sup>53</sup> *Eaton v. Eaton*, 37 N. J. Law, 108; *Mutual Life Ins. Co. of New York v. Hunt*, 79 N. Y. 541; *Fay v. Burditt*, 81 Ind. 433; *Scanlan v. Cobb*, 85 Ill. 296; *Shoulters v. Allen*, 51 Mich. 531, 16 N. W. 888.

<sup>54</sup> *Hagebush v. Ragland*, 78 Ill. 40.

ities with respect to bailment contracts as they are with respect to other contracts. Fraud, duress, or anything destroying the mutual assent will render the bailment contract void.<sup>55</sup> The legal disability of infants, married women, and persons non compos mentis is, however, to be used as a shield, and not as a sword. While they are not liable on the bailment contract for its breach, yet, if they have come into possession of the goods, they must restore them, if possible. Persons under disabilities are liable for the conversion of goods bailed to them. Their disabilities relieve them from liability on their contracts, but not from liability for their torts.<sup>56</sup> For example, where property is bailed to an infant, his infancy is a protection to him for any nonfeasance so long as he keeps within the terms of the bailment. But, when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable to the same extent as if he had wrongfully taken the property in the first instance.<sup>57</sup> So where an infant hired a horse for the purpose of going to B. and returning the same day, but, instead of doing so, returned by a circuitous route, which nearly doubled the distance, and stopped on the way, leaving the horse almost all night without food or shelter, it was held that these acts constituted a conversion, and that the infant was liable in trover for the death of the horse, caused by such overdriving and exposure.<sup>58</sup>

On the other hand, an infant may make a bailment, and all the obligations of the contract will be binding on the bailee until the

<sup>55</sup> See Clark, Cont. 288.

<sup>56</sup> Schouler, Bailm. (2d Ed.) § 27; *Mills v. Graham*, 1 Bos. & P. N. R. 140. In *Jennings v. Rundall*, 8 Term R. 335, it was said that a plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant defendant. Therefore, where the plaintiff declared that, at the defendant's request, he had delivered a mare to the defendant, to be moderately ridden, and that the defendant, maliciously intending, etc., wrongfully and injuriously rode the mare, so that she was damaged, etc., it was held that the infant might plead his infancy in bar, the action being founded on a contract. See, also, *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Hall v. Oorcoran*, 107 Mass. 251.

<sup>57</sup> Clark, Cont. 261; *Burnard v. Haggis*, 15 C. B. (N. S.) 45; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Ray v. Tubbs*, 50 Vt. 688. But see *Penrose v. Curren*, 3 Rawle, 351.

<sup>58</sup> *Towne v. Wiley*, 23 Vt. 355.



infant repudiates the contract, or recalls the thing bailed.<sup>59</sup> An infant's contracts are voidable, not void, and he alone can take advantage of his disability.<sup>60</sup> But the contracts of a married woman, where her disabilities have not been removed by statute, are wholly void. Neither party is bound by the bailment contract.<sup>61</sup> If she delivers property, however, the other party must restore it to her husband; and, if she receives property under such a void bailment, her husband must restore it, if it is in his possession.<sup>62</sup>

*Same—Bailment by Operation of Law.*

In bailments by operation of law, the capacity of the parties is material only in respect to determining what is commensurate care, which, as will be seen, is the measure of the bailee's liability. What is commensurate care has reference, *inter alia*, to the capacity and class of the parties. An individual is held only to the exercise of such care as can be reasonably expected of persons of the recognized class to which he belongs. Persons deprived of reason, as very young children or lunatics, cannot have negligence attributed to them. Persons of defective capacity or sense must exercise care with reference to their capacity. Other persons must exercise the care that an average prudent or reasonable man would exercise under the circumstances.<sup>63</sup>

*Same—Agents.*

The principles of agency apply in questions of bailment as elsewhere, and delivery of the goods which are the subject of the bailment may be made by an agent of the bailor, and accepted by an agent of the bailee,<sup>64</sup> if such delivery and acceptance are within the scope of their authority, and their acts will be binding on their principals.<sup>65</sup> Just as in other contract relations, the principal will be

<sup>59</sup> Story, Bailm. § 50; Schouler, Bailm. (2d Ed.) § 27.

<sup>60</sup> Clark, Cont. 242.

<sup>61</sup> Clark, Cont. 276.

<sup>62</sup> Story, Bailm. § 50.

<sup>63</sup> Jagg. Torts, pp. 162, 163.

<sup>64</sup> City Bank v. Perkins, 29 N. Y. 554; Brown v. Warren, 43 N. H. 430; Boynton v. Payrow, 67 Me. 587; McCready v. Haslock, 3 Tenn. Ch. 13; Lloyd v. Barden, 3 Strob. Law (S. C.) 343.

<sup>65</sup> Scranton v. Baxter, 4 Sandf. (N. Y.) 5; Blake v. Kimball, 106 Mass. 115, 116; Stevens v. Boston & M. R. Co., 1 Gray (Mass.) 277; Macklin v. Frazier,

responsible for all acts of agents in regard to the goods in question, so long as such agents are acting, apparently at least, within the bounds of their authority.<sup>66</sup> Of course, where, from the very nature of the agent's act, no authority could be presumed to have been given him for its commission, the fact of its being thus wrongful should serve as notice that it is the act of the agent personally, and not as acting for his principal, and for such act the agent alone would be liable.<sup>67</sup> The important question here is whether the thing accepted was accepted in a representative capacity, so as to bind the principal, or in an individual capacity, so as to bind the agent personally.<sup>68</sup> If an agent acting within the scope of his authority ac-

9 Bush (Ky.) 3; Schouler, Bailm. (2d Ed.) §§ 19, 30, 33; Story, Bailm. § 55; *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106. In the case of *Lloyd v. Barden*, 3 Strob. Law (S. C.) 343, it was held that, to charge a bailee with an article lost, it is not necessary that, in every case, the delivery should have been to him individually, or to one expressly or specifically authorized to receive for him; but an agency to receive may be implied in the same manner as such agency may be implied in relation to articles which were to be carried for hire. "The master and owner of a house or warehouse, allowing his servants or clerks to receive for custody the goods of another, and especially if the practice be general and unlimited, as is the case with banks in relation to special deposits, will be considered the bailee of the goods so received, and will incur the duties and liabilities belonging to that relation. Not so if the servant, secretly, and without the knowledge, express or implied, of the master, he not having authorized or submitted to the practice, receives the goods for such purpose; for no man can be made the bailee of another's property without his consent." *Parker, C. J., in Foster v. Essex Bank*, 17 Mass. 479, 498. And see *Merchants' Bank v. State Bank*, 10 Wall. 604, 650; *Elliot v. Abbot*, 12 N. H. 549; *Farrar v. Gilman*, 19 Me. 440; *McHenry v. Rldgely*, 2 Scam. 309; *Everett v. U. S.*, 6 Post. (Ala.) 166.

<sup>66</sup> See cases cited in last note.

<sup>67</sup> Schouler, Bailm. (2d Ed.) § 19; Story, Bailm. §§ 55, 60. "Wherever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal." Story, Ag. § 264. And see *Bowen v. Morris*, 2 Taunt. 374, 385; *Polhill v. Walter*, 3 Barn. & Adol. 114; *Sumner v. Williams*, 8 Mass. 178. An agent renders himself personally responsible where he makes a contract upon terms which he knows he has no authority to agree to, although the contract be made in the line of his business as agent. *Meech v. Smith*, 7 Wend. (N. Y.) 315.

<sup>68</sup> *Pattison v. Syracuse Nat. Bank*, 4 Thomp. & C. (N. Y.) 96; *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106.

cepts the bailment on behalf of his principal, the principal, and not the agent, becomes the bailee, and no liability rests upon the agent.<sup>69</sup> But, when the agent has in fact no authority to accept the bailment, then he, personally, is liable as bailee, and his principal is not bound.<sup>70</sup>

*Same—Corporations.*

Corporations may be bailees, provided the purpose of the bailment is not ultra vires.<sup>71</sup> Since a corporation can act only through its authorized agents, and since it cannot authorize ultra vires acts, where its officers or agents undertake to make a bailment contract beyond the powers of the corporation, they, and not the corporation, are liable as bailees.<sup>72</sup> So, corporations may be bailors.<sup>73</sup>

*Title of Bailor.*

In order that a person may make a valid bailment of a thing, it is not essential that he shall have the absolute title in it. If he has a special property therein, or if he has possession lawfully, it will be sufficient.<sup>74</sup> Thus, in the case of *Armory v. Delamirie*<sup>75</sup> it appeared that a boy found a jewel, and took it to a jeweler's shop, to find what it was. The jeweler refused to return the jewel, and, in an action in trover, it was held that the finder of a chattel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently he may maintain trover. Even in a case where one holds property without title and wrongfully, he may

<sup>69</sup> *Stevens v. Boston & M. R. Co.*, 1 Gray (Mass.) 277; *Blake v. Kimball*, 106 Mass. 115, 116; *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5, 7; *Macklin v. Frazier*, 9 Bush. (Ky.) 3.

<sup>70</sup> *Meech v. Smith*, 7 Wend. (N. Y.) 315.

<sup>71</sup> *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261; *Lloyd v. West Branch Bank*, 15 Pa. St. 172.

<sup>72</sup> But any property received by the corporation must be restored. *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190.

<sup>73</sup> *Combination Trust Co. v. Weed*, 2 Fed. 24; *Chouteau v. Allen*, 70 Mo. 290; *Lehman v. Tallassee Manuf'g Co.*, 64 Ala. 567.

<sup>74</sup> Story, Bailm. § 52.

<sup>75</sup> 1 Strange, 505. And see *Rooth v. Wilson*, 1 Barn. & Ald. 59. The finder of a bank note, as against a bailee to whom he delivers it, has such a possessory interest in the note as entitles him to recover it from the bailee, in the absence of any claim by the rightful owner. *Tancil v. Seaton*, 28 Grat. (Va.) 601.



make a bailment of it, which will be valid against all but the real owner. As between the parties all the rights and liabilities of a bailment relation exists.<sup>70</sup> According to the civil law, a thief might make a bailment of stolen goods, and the bailee would be obliged to restore the property to him, save as against the owner.<sup>77</sup>

*Right of Property in Bailor.*

In all cases of bailments the right of property in the thing bailed remains in the bailor.<sup>78</sup> Indeed, as has been seen, this is the distinguishing feature between bailments and sales.<sup>79</sup> The bailor may transfer the right of property, subject to the bailee's right, without the latter's consent; and notice to the bailee of such transfer of title is a sufficient constructive delivery to hold the property as against attaching creditors of the bailor, or one claiming as a bona fide purchaser.<sup>80</sup> A bailor may maintain replevin against any person wrongfully in possession of the subject of the bailment, whenever his right of property carries with it the right of possession.\*

<sup>76</sup> Taylor v. Plumer, 3 Maule & S. 562; Learned v. Bryant, 13 Mass. 224.

<sup>77</sup> Story, Bailm. §§ 52, 108.

<sup>78</sup> Story, Bailm. § 93; Henry v. Patterson, 57 Pa. St. 346, 352; Prichett v. Cook, 62 Pa. St. 193; Powder Co. v. Burkhardt, 97 U. S. 110.

<sup>79</sup> Ante, p. 6.

<sup>80</sup> Erwin v. Arthur, 61 Mo. 386; Gerber v. Monie, 56 Barb. (N. Y.) 652. Thus, where the owner of a lot of cotton in the hands of the surveyor of a port, seized by him, to await an examination in regard to charges, sold the same, and gave his vendee an order on the surveyor for the cotton, and also notified the surveyor of such sale, it was held that such action on the part of the vendor passed all his rights to his vendee, who could maintain an action of replevin for the cotton, as against a subsequent attaching creditor of his vendor, whether the surveyor had consented or not to the delivery, after the termination of his own right of possession. Hodges v. Hurd, 47 Ill. 363.

\* Strong v. Adams, 30 Vt. 221. And see Burdick v. Murray, 3 Vt. 302; Root v. Chandler, 10 Wend. (N. Y.) 110; Cannon v. Kinney, 3 Scam. (Ill.) 9; Long v. Bledsoe, 3 J. J. Marsh. 307; Overby v. McGee, 15 Ark. 459; Walker v. Wilkinson, 35 Ala. 725; White v. Brantley, 37 Ala. 430; Root v. Chandler, 10 Wend. (N. Y.) 110; Lotan v. Cross, 2 Camp. 464. Where the bailor is entitled to possession at any time, he may maintain trespass against a third person for injury to the bailed property. Walcott v. Pomeroy, 2 Pick. (Mass.) 121; Bradley v. Davis, 14 Me. 44, 47; Dallam v. Fittler, 6 Watts & S. 323, 325; Staples v. Smith, 48 Me. 470; Hart v. Hyde, 5 Vt. 328; Freeman v. Rankins, 21 Me. 446; Gauche v. Mayer, 27 Ill. 134; Shloss v. Cooper, 27 Vt. 623;

*Bailee Estopped to Dispute Bailor's Title.*

A bailee is not permitted to dispute the title of his bailor.<sup>81</sup> He cannot affect the latter's right by attornment to a stranger, nor can he be converted into a trustee for a third person by a mere notice of his claim.<sup>82</sup> A bailee may show, however, that, since the property was intrusted to him, the bailor has assigned it to another.<sup>83</sup> If legally assigned, and the bailee has notice of the fact, the bailee must account to the assignee.<sup>84</sup> The rule that a bailee cannot attorn to a stranger has no application to such a case; the assignee is not a stranger. The estoppel extends only to a denial that the bailor had title at the time he delivered the goods to the bailee.<sup>85</sup> So it was held, in a case where the defendant borrowed a gun from the plaintiff, and afterwards refused to return it, on the ground that it belonged to him, that, before he could raise the question of title in himself, he must restore possession to plaintiff. A person claim-

Hayward Rubber Co. v. Dunclee, 30 Vt. 29; Holly v. Huggefard, 8 Pick. (Mass.) 73. See post, p. 197. But, when the bailment is for a definite time, the bailor cannot maintain trespass, because he has no right to possession until the expiration of such period. Walcot v. Pomeroy, 2 Pick. (Mass.) 121, 122; Muggridge v. Eveleth, 9 Mete. (Mass.) 233; Lunt v. Brown, 13 Me. 236; Lewis v. Carsaw, 15 Pa. St. 31; Hume v. Tufts, 6 Blackf. 136; Putnam v. Wyley, 8 Johns. (N. Y.) 432; Bell v. Monahan, Dud. (S. C.) 38; McFarland v. Smith, Walk. (Miss.) 172; Lacoste v. Pipkin, 13 Smedes & M. (Miss.) 589; Soper v. Sumner, 5 Vt. 274; Clark v. Carlton, 1 N. H. 110; Wilson v. Martin, 40 N. H. 88; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; Ward v. McCauley, 4 Term R. 489.

<sup>81</sup> Story, Bailm. § 110; Britton v. Aymar, 23 La. Ann. 63, 65; Peebles v. Farrar, 73 N. C. 342; Foltz v. Stevens, 54 Ill. 180; Maxwell v. Houston, 67 N. C. 305; Thompson v. Williams, 1 Pac. 47; Marvin v. Ellwood, 11 Paige (N. Y.) 365. Where one borrows property, without alleging any right to it, he is estopped from setting up a claim to it on behalf of his wife. Pulliam v. Burlingame, 81 Mo. 111.

<sup>82</sup> Roberts v. Noyes, 76 Me. 590.

<sup>83</sup> A bailee of goods cannot set up as a defense to an action therefor that at the time he became bailee, and while he continued such, the bailor was not the owner; but he may show that, while he continued such bailee, the bailor parted with his title to the property. Gerber v. Monie, 56 Barb. (N. Y.) 652.

<sup>84</sup> Roberts v. Noyes, 76 Me. 590; Marvin v. Ellwood, 11 Paige, 365; Smith v. Hammond, 6 Sim. 10; Exchange Bank v. McLoon, 73 Me. 498.

<sup>85</sup> Roberts v. Noyes, 76 Me. 590.

ing title to a chattel cannot obtain possession by such a fraud, and exonerate himself from returning it by setting up title in himself.<sup>86</sup> A bailee of property may recover it from his bailor, if he can show that he is legally entitled to its possession or use under a valid agreement, although the latter may be the general owner. Such a bailee has a special property in the chattel, sufficient to maintain the action. The action does not involve a denial of the bailor's title.<sup>88</sup>

*Exposing Bailee to Danger.*

The bailor must not expose the bailee to danger without warning. He owes the latter the duty of disclosing faults in the thing bailed which may expose the bailee to uncommon perils, by which he may be injured.<sup>89</sup> Thus, where one hires a horse of the owner which the latter knows to be skittish and timid and apt to run away, so that it is dangerous to ride him, it is the owner's duty to disclose such facts; and if he fails to do so, and the bailee is thrown from the horse, and hurt, the owner is liable to him for the damages.<sup>90</sup>

*Care to be Exercised by Bailee.*

Commensurate care, or due care under the circumstances, is the measure of the bailee's obligation, in the absence of express contract, no matter what the bailment purpose is.<sup>91</sup> In all ordinary

<sup>86</sup> *Simpson v. Wrenn*, 50 Ill. 222. And see *Bursley v. Hamilton*, 15 Pick. (Mass.) 40, where it was held that an owner of property giving a receipt for it to an officer who had seized it under process could not set up title in himself when sued by the officer without first restoring the property to the officer. Contra, *Learned v. Bryant*, 13 Mass. 224.

<sup>88</sup> *Simpson v. Wrenn*, 50 Ill. 222; *Burdiet v. Murray*, 3 Vt. 302.

<sup>89</sup> *Story*, Bailm. §§ 390-391a; *Hadley v. Cross*, 34 Vt. 586; *Horne v. Meakin*, 115 Mass. 326; *Reading v. Price*, 3 J. J. Marsh. (Ky.) 61; *Kissam v. Jones*, 56 Hun, 432, 10 N. Y. Supp. 94.

<sup>90</sup> *Story*, Bailm. § 391a; *Campbell v. Page*, 67 Barb. (N. Y.) 113. And see *Fowler v. Lock*, L. R. 7 C. P. 272; and post, pp. 88, 185.

<sup>91</sup> 2 Jagg. Torts, 88; *Hall v. Chicago, B. & N. Ry. Co.*, 46 Minn. 439, 49 N. W. 239; *Meredith v. Reed*, 26 Ind. 334; *Barnum v. Terpenning*, 75 Mich. 557, 42 N. W. 967; *Grand Trunk Ry. Co. of Canada v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440; *Pennsylvania R. Co. v. O'Shaughnessy*, 122 Ind. 588, 23 N. E. 675; *Smith v. New York Cent. R. Co.*, 24 N. Y. 222; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; *McAdoo v. Richmond & D. R. Co.*, 105 N. C. 140, 11 S. E. 316; *Storer v.*

classes of bailments, losses occurring without negligence on the part of the bailee fall upon the bailor.<sup>92</sup> The bailee's liability turns upon the presence or absence of negligence. In some exceptional bailments, as in the case of carriers or innkeepers, there is an exceptional liability, approximating that of an insurer.<sup>93</sup> But, generally speaking, there can be no recovery against a bailee for loss or damage to the property, in the absence of negligence.<sup>94</sup>

Lord Holt, in *Coggs v. Bernard*,<sup>95</sup> distinguished, as to bailment, three grades or degrees of negligence: In bailments for the sole benefit of the bailor, the bailee will be liable only for gross negligence; in bailments for the mutual benefit of both parties, he will be liable for ordinary negligence; in bailments for the exclusive advantage of the bailee, he will be liable even for slight negligence. This distinction of three degrees of negligence has been perpetuated in text-books and decisions, until it has become so interwoven in the law of bailments that it is impossible to discard it, though it has been frequently, severely, and justly criticised.\* It certainly is misleading. Negligence may be defined generally as the breach of a duty to exercise commensurate care, resulting in damage.<sup>96</sup> Any

Gowen, 18 Me. 174; *Lane v. Boston & A. R. Co.*, 112 Mass. 455; *Hinton v. Dibbin*, 2 Q. B. 646; *Wyld v. Pickford*, 8 Mees. & W. 442.

<sup>92</sup> *Wood v. McClure*, 7 Ind. 155; *Watkins v. Roberts*, 28 Ind. 167; *Carpenter v. Branch*, 13 Vt. 161, 164; *Beller v. Schultz*, 44 Mich. 529, 7 N. W. 225; *Cass v. Boston & L. R. Co.*, 14 Allen (Mass.) 448; *Chenowith v. Dickinson*, 8 B. Mon. 156, 158.

<sup>93</sup> See post, pp. 254, 301.

<sup>94</sup> *Abraham v. Nunn*, 42 Ala. 51; *Yale v. Oliver*, 21 La. Ann. 454; *Levy v. Bergeron*, 20 La. Ann. 290; *Waller v. Parker*, 5 Cald. (Tenn.) 476; *James v. Greenwood*, 20 La. Ann. 297; *Britton v. Aymar*, 23 La. Ann. 63; *McGinn v. Butler*, 3 Iowa, 160; *Watkins v. Roberts*, 28 Ind. 167; *Shiells v. Blackburne*, 1 H. Bl. 158.

<sup>95</sup> 2 Ld. Raym. 909.

\* Degrees of negligence are not recognized in some cases. *Bigelow*, Torts, § 265; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278; *Hall v. Railroad Co.*, 46 Minn. 439, 49 N. W. 239; *Gill v. Middleton*, 105 Mass. 479; See, also, as to degrees of negligence, *The New World v. King*, 16 How. 474; *Railroad Co. v. Lockwood*, 17 Wall. 382; *Wilson v. Brett*, 11 Mees. & W. 113; *Grill v. Iron Screw Collier Co.*, L. R. 1 C. P. 612.

<sup>96</sup> 2 Jagg. Torts, 810; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686; *Brown v. Railway Co.*, 49 Mich. 153, 13 N. W. 494; *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781, 784.

omission of such duty resulting in damage ought to impose liability. There is no such thing as excusable negligence. It is said that gross negligence is "ordinary negligence with a vituperative adjective."<sup>97</sup> It would, perhaps, be more logical to apply the adjective of comparison to the term "diligence" rather than to the correlative term "negligence." Thus, where the exercise of great diligence is the duty imposed, a slight omission of diligence—i. e. slight negligence—is a failure to exercise commensurate care. Where only slight diligence is the measure of duty, slight omissions do not involve a failure to exercise commensurate care, and therefore there is no negligence. In such a case it is very misleading to say that there is slight negligence, but no liability. When only slight diligence is required, there must be a gross omission of diligence—an omission of almost all diligence—in order to involve a failure to exercise commensurate care, or, in other words, to constitute negligence; for commensurate care in such a case is slight care.<sup>98</sup> Nevertheless, the terms "slight negligence," "gross negligence," and "ordinary negligence" are convenient terms to indicate the degree of care required.<sup>99</sup>

It remains to show what is meant by the terms "slight," "ordinary," and "great or extraordinary" diligence or negligence,—a task which is by no means an easy one. According to Judge Story,<sup>100</sup> "slight diligence is that which persons of less than common prudence, or, indeed, of any prudence at all, take of their own concerns." By Sir William Jones,<sup>101</sup> slight diligence is considered to be "the exercise of such diligence as a man of common sense, however inattentive, takes of his own concerns." It is probably safe to say that the diligence shown in their own affairs by men careless in their

<sup>97</sup> Rolfe, B., in *Wilson v. Brett*, 11 Mees. & W. 113, 115.

<sup>98</sup> *The New World v. King*, 16 How. 469, 474; *McAdoo v. Richmond & D. R. Co.*, 105 N. C. 140, 150, 11 S. E. 316; *Milwaukee & St. P. Ry. Co. v. Arms*, 91 U. S. 489, 494.

<sup>99</sup> "'Gross negligence' is a convenient phrase to express the idea that the degree of care required of defendant is small." Lord Chelmsford in *Giblin v. McMullen*, L. R. 2 P. C. 317-340.

<sup>100</sup> Story, *Bailm.* § 16. And see *Vaughan v. Menlove*, 3 Bing. N. C. 468, 475.

<sup>101</sup> Jones, *Bailm.* § 8. And see *Tompkins v. Saltmarsh*, 14 Serg. & R. (Pa.) 275.



habits, and not necessarily prudent by nature, but of ordinary intelligence, is slight diligence. Want of such diligence constitutes great or gross negligence, which has by some been held to amount to fraud, or to be evidence thereof.<sup>102</sup> It may be safely stated, however, that gross negligence, except under unusual circumstances, is not equivalent to fraud, nor does it necessarily raise a presumption of fraud.<sup>103</sup> Ordinarily diligence may be said to be that displayed in the management of their own affairs by the average business or professional men, met with in daily life,—men who have the usual amount of common practical sense in the management of the necessary details of their business, and who are endowed with ordinary prudence and foresight. In this view of the question, it will be seen that what constitutes ordinary diligence is dependent upon and varies with the facts of each case.<sup>104</sup> In the words of Judge Story,<sup>105</sup> “that may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live.” As defined by Sir William Jones,<sup>106</sup> it is “the care which every person of common prudence, and capable of governing a family, takes of his own concerns.” The standard of ordinary diligence must, of necessity, vary with time and place, since what might be ordinary diligence at certain times and in certain localities might at different times and in other places amount to but slight diligence. The influence of custom and business must also be considered in determining what is ordinary diligence, as, in certain trades, dispositions may be made of goods by a man of

<sup>102</sup> Story, Bailm. § 19; Jones, Bailm. §§ 8, 10, 46, 47, 119, 120; Tudor v. Lewis, 3 Metc. (Ky.) 378.

<sup>103</sup> Story, Bailm. § 19; Mytton v. Cock, 2 Strange, 1099; Batson v. Donovan, 4 Barn. & Ald. 21; Clarke v. Earnshaw, 1 Gow, 30; Jones v. Smith, 1 Hare, 43, 71; Wilson v. York & M. L. R. Co., 11 Gill & J. (Md.) 58; Tompkins v. Saltmarsh, 14 Serg. & R. 275.

<sup>104</sup> Farmer v. McCraw, 26 Ala. 189; U. S. v. Yukers, 9 C. C. A. 171, 60 Fed. 641; Hoffman v. Tuolumne County Water Co., 10 Cal. 413; Spokane Truck & Dray Co. v. Hoefer, 2 Wash. St. 45, 25 Pac. 1072; Austin & N. N. R. Co. v. Beatty, 73 Tex. 592, 11 S. W. 858; Marsh v. Benton Co., 75 Iowa, 469, 471, 39 N. W. 713.

<sup>105</sup> Story, Bailm. § 11.

<sup>106</sup> Jones, Bailm. § 6.

ordinary prudence which under other circumstances would certainly be open to the charge of great 'negligence.'<sup>107</sup> Moreover, what would be the exercise of ordinary care with regard to articles of a certain kind might be far from such with regard to those of a different sort.<sup>108</sup> Where one is wanting in the exercise of ordinary care, he is said to be guilty of ordinary negligence.<sup>109</sup> Great diligence is that care shown in the management of his own business by a man of great vigilance and foresight, and of a prudent nature,—one given to exerting unusual skill and care upon his business affairs.<sup>110</sup> Want of it is slight negligence.

*Liability under Special Contract.*

As stated in the black-letter text, the rights and liabilities of the parties are largely determined by the special bailment contract and

<sup>107</sup> Story, Bailm. § 12.

<sup>108</sup> *Batson v. Donovan*, 4 Barn. & Ald. 21; *Sleat v. Fagg*, 5 Barn. & Ald. 342; *Nelson v. Macintosh*, 1 Starkie, 237; *The New World v. King*, 16 How. 475; *Baltimore & O. R. Co. v. Schumacher*, 29 Md. 168, 175; *State v. Meagher*, 44 Mo. 356, 363; *Tracy v. Wood*, 3 Mason, 132, Fed. Cas. No. 14,130. "The value is an ingredient to be taken into consideration upon the question of gross negligence; for that may be gross negligence in the case of a parcel of extraordinary value, which, in the case of another parcel, would not be so. The trusting a parcel of £5,000 or £10,000 for a moment out of the personal care and superintendence of a trustworthy servant would, if it were stolen during that interval, be gross negligence; but the trusting a parcel of 40s. value in the same way would not." Bayley, J., in *Batson v. Donovan*, 4 Barn. & Ald. 21, 36. The value of the property and the compensation paid are to be considered in determining whether the proper care and skill demanded by the circumstances were employed. *Storer v. Gowen*, 18 Me. 174; *Doorman v. Jenkins*, 2 Adol. & E. 256, 29 E. C. L. 132; *Gibbon v. Paynton*, 4 Burrows, 2298; *Batson v. Donovan*, 4 Barn. & Ald. 21, 6 E. C. L. 373; *Nelson v. Macintosh*, 1 Starkie, 237, 2 E. C. L. 96; *Phillips v. Earle*, 8 Pick. (Mass.) 182.

<sup>109</sup> Theft is not presumptive evidence of bailee's want of ordinary care. *Mills v. Gilbreth*, 47 Me. 320.

<sup>110</sup> *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5; *Wood v. McClure*, 7 Ind. 155; *Bennett v. O'Brien*, 37 Ill. 250; *Hagebush v. Ragland*, 78 Ill. 40; *Kennedy v. Ashcraft*, 4 Bush (Ky.) 530; *Lane v. Cameron*, 38 Wis. 603; *Cullen v. Lord*, 39 Iowa, 302; *Stewart v. Davis*, 31 Ark. 518. Bailee will be liable for acts and negligence of his servants, within the scope of their authority, as for his own. *Finucane v. Small*, 1 Esp. 315; *Haly v. Markel*, 44 Ill. 225; *Sewall v. Allen*, 6 Wend. 335; *Smith v. First Nat. Bank*, 99 Mass. 605.

purpose. Bailment contracts are largely implied. From the delivery of a chattel in bailment, the law implies an undertaking on the part of the bailee to execute the bailment purpose with due care, skill, and fidelity.<sup>111</sup> In each class of bailments the liability thus imposed by law, in the absence of express contract, is different. The parties may, however, substitute a special contract for this contract implied by law. In such cases the express agreement determines the rights and liabilities arising from the bailment.<sup>112</sup> The bailee may be relieved of all liability, or he may become an insurer. The liability of a bailee, however, is not to be enlarged or restricted by words of doubtful meaning. The intent to vary the liability imposed by law must clearly appear.<sup>113</sup> So, also, the contract must not be in contravention of positive law or public policy, or it will be disregarded. Thus, a bailee cannot contract against liability for his own fraud.<sup>114</sup> There would seem to be no principle of law which would prevent ordinary bailees from contracting against liability for any degree of negligence, but the point is not free from doubt.<sup>115</sup> It is well settled, however, that common carriers cannot contract against liability for negligence. Owing to their exceptional nature, such contracts are regarded as against public policy.<sup>116</sup> It is also suggested that one ought not to be able to contract so as to become unaccountable for the acts of his own agents or servants.<sup>117</sup>

*Bailee must Act in Good Faith.*

The bailee must act in good faith, and endeavor to carry out the purpose of the bailment. He is liable for any willful wrong or fraud. He cannot contract against it. A bailee is, of course, lia-

<sup>111</sup> Story, Bailm. § 10; Conway Bank v. American Exp. Co., 8 Allen, 512, 516.

<sup>112</sup> Ames v. Belden, 17 Barb. (N. Y.) 515; Kettle v. Bromsall, Willes, 118; Trefftz v. Canelli, L. R. 4 P. C. 277; Parker v. Tiffany, 52 Ill. 286; Remick v. Atkinson, 11 N. H. 256; Vaughan v. Webster, 5 Har. (Del.) 256. But see, as to a carrier's contract to carry "safely," Austin v. Manchester, S. & L. Ry. Co., 5 Eng. Law & Eq. 329; Shaw v. York & N. M. Ry. Co., 13 Q. B. 347.

<sup>113</sup> Trefftz v. Canelli, L. R. 4 P. C. 277; Belden v. Perkins, 78 Ill. 449.

<sup>114</sup> Wells v. Steam Navigation Co., 8 N. Y. 375; Pennsylvania R. Co. v. McCloskey's Adm'r, 23 Pa. St. 526.

<sup>115</sup> See Lancaster County Nat. Bank v. Smith, 62 Pa. St. 47.

<sup>116</sup> See post, p. 413.

<sup>117</sup> Peek v. North Staffordshire Ry. Co., 10 H. L. Cas. 473, 494.



ble, irrespective of negligence or fraud, for any absolute breach of the bailment contract, or when he converts the goods in his possession to his own use. A bailee is liable for conversion when he departs from the bailment purpose or violates the bailment contract.<sup>118</sup> A bailment gives no implied authority to sell or pledge the goods, and if the bailee does so, without express authority, he is liable for conversion.<sup>119</sup> So, also, when he delivers the goods to the wrong party, he is at once liable to the true owner.<sup>120</sup> If the goods have

<sup>118</sup> *Martin v. Cuthbertson*, 64 N. C. 328; *Lane v. Cameron*, 38 Wis. 603; *Cullen v. Lord*, 39 Iowa, 302; *Lane v. Mills* (Ind. App.) 39 N. E. 870; *Fisher v. Kyle*, 27 Mich. 454; *Ross v. Southern Cotton-Oil Co.*, 41 Fed. 152; *Wintringham v. Hayes*, 144 N. Y. 1, 38 N. E. 999; *Townsend v. Rich* (Minn.) 60 N. W. 545; *Foster v. Essex Bank*, 17 Mass. 479; *Sodowsky's Ex'r v. McFarland*, 3 Dana (Ky.) 204. Demand and refusal to redeliver bailed property are evidence of conversion in action to recover it. *Pribble v. Kent*, 10 Ind. 325; *King v. Bates*, 57 N. H. 446; *Farrant v. Thompson*, 2 Dowl. & R. 1; *Sanborn v. Colman*, 6 N. H. 14; *Sargent v. Gile*, 8 N. H. 325. In *Dale v. Brinckerhoff*, 7 Daly, 45, it was held that a gratuitous bailee who sold the property left with him without authority of the bailor, and without notice to him, was thereby guilty of conversion. "This was a conversion, whatever may have been their private intent." See, to the same effect, *Pease v. Smith*, 61 N. Y. 477.

<sup>119</sup> *Calhoun v. Thompson*, 56 Ala. 166; *McMahon v. Sloan*, 12 Pa. St. 229, 231. Bailee pledging another's property without authority is guilty of conversion; and both bailee and pledgee are liable in trover, whether pledgee knew real state of title or not. *Thrall v. Lathrop*, 30 Vt. 307. Bailees for special purpose have no right to sell property bailed, and, upon such sale, bailment is determined, and real owner may replevy it from vendee. *Emerson v. Fisk*, 6 Greenl. (Me.) 200.

<sup>120</sup> Defendant as bailee held property of plaintiff's under instructions not to deliver it to any one without plaintiff's written order. Defendant delivered the property to plaintiff's wife upon an order which proved to be a forgery. Held, that defendant was liable for value of the property. *Koening v. Manley*, 49 N. Y. 192. Misdelivery of property by any bailee to unauthorized person is of itself conversion, rendering bailee liable in trover, without regard to question of due care or degree of negligence. *Hall v. Boston & W. R. Corp.*, 14 Allen, 439. "If one man, who is intrusted with the goods of another, put them into the hands of a third person, contrary to orders, it is a conversion." *Buller, J.*, in *Syeds v. Hay*, 4 Term R. 260. See, also, *Coles v. Clark*, 3 Cush. (Mass.) 399; *Parker v. Lombard*, 100 Mass. 405; *Tombler v. Koelling* (Ark.) 28 S. W. 795. And see *Lubbock v. Inglis*, 1 Starkle, 104; *Dufour v. Mephram*, 31 Mo. 577; *Clark v. Spence*, 10 Watts, 325, 337; *Hawkins v. Hoffman*, 6 Hill, 588; *Lichtenhein v. Boston & P. R. Co.*, 11

been lost or destroyed, or for any other reason a demand would be futile, none is necessary.<sup>121</sup>

*Redelivery—Negligence Presumed from Loss or Damage.*

As has been seen, the obligation to redeliver or deliver over the property at the termination of the bailment on demand is an essential part of every bailment contract.<sup>122</sup> If the bailee fails to do so, he is liable, unless he can show that his inability arises without fault on his part.<sup>123</sup> There is considerable confusion among the decisions in regard to the burden of proof in cases where a bailee is sued for a loss or injury. A line of decisions hold that in cases founded on negligence the burden of proving it affirmatively rests on the plaintiff throughout, and that, when a bailee is sued for a negligent loss or injury, mere proof of the loss or injury does not alone make a *prima facie* case.<sup>124</sup> But the better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff, and does not shift throughout the trial, the burden of proceeding does shift, and

Cush. 70; *Heugh v. London & N. W. Ry. Co.*, L. R. 5 Exch. 51; *Jenkins v. Bacon*, 111 Mass. 373; *Lancaster County Nat. Bank v. Smith*, 62 Pa. St. 47; *American Exp. Co. v. Stack*, 29 Ind. 27.

<sup>121</sup> Where a watch given to a watchmaker to be repaired is stolen through his negligence, no demand is necessary in order that the bailor may sue. *Halyard v. Dechelman*, 29 Mo. 459. See, also, *Phelps v. Bostwick*, 22 Barb. (N. Y.) 314; *Negus v. Simpson*, 99 Mass. 388; *Cothran v. Moore*, 1 Ala. 423.

<sup>122</sup> *Story, Bailm.* §§ 96, 98, 341; *Schouler, Bailm.* §§ 59, 97, 159. See ante, p. 11.

<sup>123</sup> "A refusal to redeliver the property bailed on demand is a conversion, unless the defendant can excuse himself by showing that the property was lost or destroyed, without any neglect on his part." *Per curiam*, in *Vaughan v. Webster*, 5 Har. (Del.) 256. And see *SeEVERS v. Gabel* (Iowa) 62 N. W. 669; *Benje v. Creagh's Adm'r*, 21 Ala. 151. Seizure of property under judicial process will excuse nondelivery. *Watkins v. Roberts*, 28 Ind. 167; *Cook v. Holt*, 48 N. Y. 275; *Edson v. Weston*, 7 Cow. 278; *Burton v. Wilkinson*, 18 Vt. 186.

<sup>124</sup> 2 Kent, Comm. (4th Ed.) Lect. 40, p. 587; *Adams v. Carlisle*, 21 Pick. (Mass.) 146; *Harrington v. Snyder*, 3 Barb. (N. Y.) 380; *Finucane v. Small*, 1 Esp. 315; *Butt v. Great Western R. Co.*, 11 C. B. 140; *Smith v. First Nat. Bank*, 99 Mass. 605; *Cross v. Brown*, 41 N. H. 283; *Carsley v. White*, 21 Pick. 254; *Brind v. Dale*, 8 Car. & P. 207; *Foot v. Storrs*, 2 Barb. (N. Y.) 326; *Browne v. Johnson*, 29 Tex. 40, 43. This is the English rule. *Finucane v. Small*, 1 Esp. 315; *Cooper v. Barton*, 3 Camp. 5, note; *Harris v. Packwood*, 3 Taunt. 264; *Gilbart v. Dale*, 5 Adol. & E. 543.

that where the plaintiff has shown that the bailee received the property in good condition, and failed to return it, or returned it badly injured, he has made out a *prima facie* case of negligence.<sup>125</sup> "When he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus rests upon defendant to prove that the injury was caused without his fault."<sup>126</sup> "*Res ipsa loquitur.*"<sup>127</sup> Unless the bailee overcomes this *prima facie* case by showing that the loss or damage was consistent with the absence of fault on his part, the plaintiff must prevail. Where the bailee makes such showing, however, as where he shows that the property was stolen or injured by "his major, the burden of proceeding shifts back to the plaintiff, and he must show that the bailee was negligent in exposing the property to risk of harm, or in failing to avoid the danger after it was known.<sup>128</sup> In other words,

<sup>125</sup> *Boies v. Hartford & N. H. R. Co.*, 37 Conn. 272; *Funkhouser v. Wagner*, 62 Ill. 59; *Goodfellow v. Meegan*, 32 Mo. 280, 284; *Bennett v. O'Brien*, 37 Ill. 250; *Vaughan v. Webster*, 5 Har. (Del.) 256; *Safe Deposit Co. of Pittsburgh v. Pollock*, 85 Pa. St. 391; *Wintringham v. Hayes*, 144 N. Y. 1, 38 N. E. 999; *Claffin v. Meyer*, 75 N. Y. 260; *Coleman v. Livingston*, 36 N. Y. Super. Ct. 32; *Golden v. Romer*, 20 Hun (N. Y.) 438; *McDaniels v. Robinson*, 26 Vt. 316; *Wilson v. Southern Pac. R. Co.*, 62 Cal. 164; *Thompson v. Ry. Co.*, 59 Mo. App. 37; *Beller v. Schultz*, 44 Mich. 529, 7 N. W. 225; *Beardslee v. Richard*, 11 Wend. 25; *McCarthy v. Wolfe*, 40 Mo. 520; *Cross v. Brown*, 41 N. H. 283; *Collins v. Bennett*, 46 N. Y. 490; *Lamb v. Western R. Corp.*, 7 Allen, 98.

<sup>126</sup> *Ruger, C. J.*, in *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562, 568. See *Alden v. Pearson*, 3 Gray (Mass.) 342; *Platt v. Hibbard*, 7 Cow. (N. Y.) 497; *Burnell v. New York Cent. R. Co.*, 45 N. Y. 184; *Schwerin v. McKie*, 51 N. Y. 180; *Fairfax v. New York Cent. & H. R. R. Co.*, 67 N. Y. 11. Bailee may make out a *prima facie* defense by showing that the injury or loss occurred under circumstances not in themselves imputing any fault to him. *Schwerin v. McKie*, 51 N. Y. 180; *First Nat. Bank of Carlisle v. Graham*, 85 Pa. St. 91; *Cochran v. Dinsmore*, 49 N. Y. 249; *Cox v. O'Riley*, 4 Ind. 368; *Boies v. Hartford & N. H. R. Co.*, 37 Conn. 272; *Logan v. Mathews*, 6 Pa. St. 417; *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Malaney v. Taft*, 60 Vt. 571, 15 Atl. 326.

<sup>127</sup> *Jagg. Torts*, p. 938.

<sup>128</sup> *Lamb v. Transportation Co.*, 46 N. Y. 271, 279; *Claffin v. Meyer*, 75 N. Y. 260; *Babcock v. Murphy*, 20 La. Ann. 399; *McCullom v. Porter*, 17 La. Ann. 89; *Kincheloe v. Priest*, 89 Mo. 240, 1 S. W. 235; *Farnham v. Camden & A. R. Co.*, 55 Pa. St. 53; *Gay v. Bates*, 99 Mass. 263; *Railroad Co. v. Reeves*, 10 Wall. 176; *Transportation Co. v. Downer*, 11 Wall. 129; *Gilbart v. Dale*, 5 Adol. & E. 543, 31 E. C. L. 723; *Midland R. Co. v. Bromley*, 17 C. B. 372.

the weight of evidence may be in favor first of one party and then the other, but the burden of proof rests on plaintiff throughout.\*

*Same—To Whom Made.*

The duty to redeliver is absolute if it is within the power of the bailee; and therefore, where the bailee delivers the property to the wrong person, he is liable, irrespective of the question of negligence.† A forged order will not protect a bailee from liability for a wrong delivery.‡

The bailment contract itself usually determines to whom the property is to be delivered upon the termination of the bailment. If it does not, the contract implied by law is that it is to be delivered to the bailor.<sup>129</sup> The delivery may be made to a duly-authorized agent, and the bailee will be exonerated even if he did not know the agent had authority to receive it.<sup>130</sup> A bailment by an agent is a bailment for his principal, and redelivery may be made to the principal direct.<sup>131</sup> If the bailor acted as guardian, executor, administrator, or trustee in creating the bailment, and his authority has terminated, delivery should be made to his successor.<sup>132</sup> On the same principle, on the death or incapacity of the bailor, the bailee should deliver to

\* McKelvey, Ev. c. 4.

† Ganley v. Troy City Nat. Bank, 98 N. Y. 487; Bank of Oswego v. Doyle, 91 N. Y. 32, 42; Willard v. Bridge, 4 Barb. 361; Graves v. Smith, 14 Wis. 5; Jenkins v. Bacon, 111 Mass. 373; Dufour v. Mephram, 31 Mo. 577; Jeffersonville R. Co. v. White, 6 Bush. 251; Alabama & T. R. R. Co. v. Kidd, 35 Ala. 209. But see Lancaster County Nat. Bank v. Smith, 62 Pa. St. 47. In some jurisdictions the question of negligence has been considered in the matter of delivery. See Manhattan Bank v. Walker, 130 U. S. 267, 9 Sup. Ct. 519; Lancaster County Nat. Bank v. Smith, 62 Pa. St. 47; Heugh v. London & N. W. Ry. Co., L. R. 5 Exch. 51.

‡ Kowing v. Manly, 49 N. Y. 192; Lichtenhein v. Railroad Co., 11 Cush. 70; Hall v. Boston & W. R. Co., 14 Allen, 439; Forsythe v. Walker, 9 Pa. St. 148; Collins v. Burns, 63 N. H. 1; Dufour v. Mephram, 31 Mo. 577; McGinn v. Butler, 31 Iowa, 160; Stephenson v. Price, 30 Tex. 715; Willard v. Bridge, 4 Barb. 361; Alabama & T. R. R. Co. v. Kidd, 35 Ala. 209.

<sup>129</sup> Pribble v. Kent, 10 Ind. 325; Hudmon v. Du Bose, 85 Ala. 446, 5 South. 162; Collins v. Burns, 63 N. Y. 1, 7; Willard v. Bridge, 4 Barb. (N. Y.) 361, 367; Dufour v. Mephram, 31 Mo. 577; Graves v. Smith, 14 Wis. 5; Coles v. Clark, 3 Cush. (Mass.) 399.

<sup>130</sup> Chattahoochee Nat. Bank v. Schley, 58 Ga. 369, 374.

<sup>131</sup> Hamilton v. Nickerson, 11 Allen, 308.

<sup>132</sup> Story, Bailm. § 109. And see Gray v. Johnston, L. R. 3 H. L. 1.

his personal representatives. Under many circumstances, sometimes from the very nature of the bailment, the bailee must decide upon his own responsibility to whom the delivery should be made. Thus, a depositary who accepts a deposit to be paid over to a third person on the happening of a certain event must at his peril decide whether the event has happened.<sup>188</sup> A stakeholder or an officer holding attached goods must decide at his peril who is finally entitled to them.<sup>184</sup> When a third person claims title to the goods held by a bailee, he acts at his peril in disregarding the notice and delivering to his bailor,<sup>185</sup> though, if he in good faith delivers the goods to his bailor without notice of any adverse claim, he will be protected.<sup>186</sup> For his own protection, in such cases, the bailee may refuse to deliver the goods to the claimant, and call in his bailor to defend against the claim;<sup>187</sup> and he may compel the rival claimants to interplead for the goods, if there is privity between them, as where one claims as assignee of the bailor;<sup>188</sup> but, when no privity exists, he cannot compel them to interplead.<sup>189</sup>

<sup>188</sup> *Carle v. Bearce*, 33 Me. 337, 340; *Chase v. Gates*, 33 Me. 363; *Treffitz v. Canelli*, L. R. 4 P. C. 277, 282; *Lafarge v. Morgan*, 11 Mart. (La.) 462.

<sup>184</sup> *State v. Fitzpatrick*, 64 Mo. 185; *Mott v. Pettit*, Coxe (N. J.) 298.

<sup>185</sup> *Willson v. Anderton*, 1 Barn. & Adol. 450.

<sup>186</sup> Thus, the lessee of a warehouse received from the preceding lessee certain cotton which the latter said had been stored by H. & T. The cotton was subsequently delivered to H. & T., and the warehouseman was held not liable therefor to the real owner; for he, being intrusted with the possession merely, transferred the possession according to the directions of the person from whom he received it, without notice of any better title, and without undertaking to convey any title, and such acts are not evidence of a conversion. *Parker v. Lombard*, 100 Mass. 405. So, in *Strickland v. Barrett*, 20 Pick. 415, B., who was a mortgagor in possession of certain goods, conspired with H. to remove them out of the reach of the mortgagee, and employed the defendant to assist in removing them; and it was held that defendant was not liable in trover, unless he knew of the intent to deprive the plaintiff of his property. And where one received a gun as a pledge from a person in possession of it, and restored it to him before any demand by the owner, this was not found to be a conversion. *Leonard v. Tidd*, 3 Mete. (Mass.) 6. See, also, *Loring v. Mulcahy*, 3 Allen, 575. *Nelson v. Iverson*, 17 Ala. 216. And see *Brown v. Thayer*, 12 Gray, 1.

<sup>187</sup> *Schouler*, Bailm. (2d Ed.) § 60; *Story*, Bailm. § 111.

<sup>188</sup> *Bechtel v. Sheaffer*, 117 Pa. St. 555, 11 Atl. 889.

<sup>189</sup> *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *First Nat. Bank of Morris-*



It is doubtful whether a bailee has a right to yield even to regular legal proceedings without defending, or at least notifying the bailor of such proceedings.<sup>140</sup> Where the bailee, however, has surrendered the property to the true owner on demand, such fact is a valid defense to an action against him for conversion. The rule that a bailee cannot set up the title of a third person as against his bailor has no application to such a case.<sup>141</sup> The rule only applies in cases where the bailee seeks to avail himself of the title of a third person for the purpose of keeping the property himself from the bailor, and to all cases where the bailee has not yielded to a paramount title in another.<sup>142</sup> It does not apply where the property has been taken from

town v. Bininger, 26 N. J. Eq. 345; Bartlett v. The Sultan, 23 Fed. 257; Bechtel v. Sheafer, 117 Pa. St. 555, 11 Atl. 889.

<sup>140</sup> Scranton v. Farmers' & Mechanics' Bank of Rochester, 24 N. Y. 424, 427.

<sup>141</sup> Gerber v. Monie, 56 Barb. (N. Y.) 652. But he takes the risk of showing that such person had a good title. Foltz v. Stevens, 54 Ill. 180; Dodge v. Meyer, 61 Cal. 405; Maxwell v. Houston, 67 N. C. 305. The bailee may show in defense that the bailor obtained the property from the real owner feloniously or by fraud. Bates v. Stanton, 1 Duer, 79; King v. Richards, 6 Whart. 418; Kelly v. Patchell, 5 W. Va. 585. Where a bailee is sued in trover by the real owner, and compelled to pay the value of the goods, he may assert the title thus acquired in defense to an action of his bailor. Cook v. Holt, 48 N. Y. 275.

<sup>142</sup> Western Transp. Co. v. Barber, 56 N. Y. 544; Burton v. Wilkinson, 18 Vt. 186; Wallace v. Matthews, 39 Ga. 617; Bliven v. Hudson River R. Co., 36 N. Y. 403; King v. Richards, 6 Whart. 418; Stephenson v. Price, 30 Tex. 715, 717. A bailee cannot, in an action brought against him by his bailor, set up the title of a third person, except by the authorization of that person. Dodge v. Meyer, 61 Cal. 405. A bailee may not set up the claim of the true owner when the true owner has abandoned such claim. Betteley v. Reed, 3 Gale & D. 561. Although, in certain cases, a bailee may set up the jus tertii, yet, if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such a claim as against his bailor. Ex parte Davies, In re Sadler, 19 Ch. Div. 86. One borrowing property on promise to return it cannot release himself from his promise by purchasing a title adverse to that of the lender. Nudd v. Montanye, 38 Wis. 511. A bailee is not permitted to dispute the title of his bailor, but he may show that the bailor has assigned his title to another, since the property was intrusted to him. If legally assigned, and the bailee has notice of the fact, the bailee must account to the assignee. The rule that a bailee should not attorn to a stranger does not apply; the assignee is not a stranger. Roberts v. Noyes, 76 Me. 590.

the bailee by due process of law.<sup>143</sup> In *Biddle v. Bond*<sup>144</sup> it was said: "We think that the true ground on which a bailee may set up the jus tertii is that indicated in *Shelbury v. Scotsford*,<sup>145</sup> viz. that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in *Betteley v. Reed*,<sup>146</sup> that 'to allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another, who makes no claim or has abandoned all claim, would enable a depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever.' Nor is it enough that an adverse claim is made upon him, so that he may be entitled to relief under an interpleader. We assent to what is said by Pollock, C. B., in *Thorne v. Tilbury*,<sup>147</sup> that a bailee can set up the title of another only 'if he defends upon the right and title and by the authority of' that person."

#### ROMAN CLASSIFICATION.

3. According to the classification of the civil law, bailments are of six kinds:

(a) Depositum.

(b) Mandatum.

(c) Commodatum.

(d) Mutuum.

(e) Pignus.

(f) Locatio.

*an enumeration rather than a classification. See refined also*

4. **DEPOSITUM**—A depositum is a delivery of goods to be kept for the bailor without recompense (p. 38). *Alight*

5. **MANDATUM**—A mandatum is a delivery of goods to have some service performed about them by the bailee without recompense (p. 38). *Care*

<sup>143</sup> *Bliven v. Hudson River R. Co.*, 36 N. Y. 403; *Burton v. Wilkinson*, 18 Vt. 186; *Van Winkle v. Steamship Co.*, 37 Barb. (N. Y.) 122; *Welles v. Thornton*, 45 Barb. (N. Y.) 390; *Cook v. Holt*, 48 N. Y. 275.

<sup>144</sup> 6 Best & S. 225, 233.

<sup>145</sup> Yelv. (3d Ed., translated) 23.

<sup>146</sup> 4 Q. B. 511, 517.

<sup>147</sup> 3 Hurl. & N. 534, 537.



*great use* 6. **COMMODATUM**—A commodatum is a gratuitous loan of goods to be temporarily used by the bailee, and returned in specie (p. 81).

*Ordinary case* 7. **MUTUUM**—A mutuum is a delivery of goods, not to be returned in specie, but to be replaced by other goods of the same kind. At common law, such a transaction is regarded as a sale or exchange, and not a bailment (p. 8).

*Ordinary case* 8. **PIGNUS**—A pignus, pledge, or pawn, is a delivery of goods as security for some debt or engagement, accompanied by a power of sale in case of default (p. 101).

*great use* 9. **LOCATIO**—A locatio, or hiring, is a bailment for reward, and may be of four kinds (p. 177):

- (a) Locatio rei, or the hiring of a chattel for use.
- (b) Locatio operis faciendi, or the hiring of work and labor.
- (c) Locatio custodiæ, or the hiring of care and services to be bestowed on the thing delivered.
- (d) Locatio operis mercium vehendarum, or the hiring of the transportation of goods.

The above classification is unnecessarily refined. The rights and liabilities of the parties to a bailment, as we shall see, depend primarily upon which one is to receive the benefits of the transaction.<sup>148</sup> The law justly imposes a stricter liability upon one who is to receive the whole benefit of the bailment than upon one who entered into it solely out of good will, and for the accommodation of the other party.<sup>149</sup> Accordingly, bailments may be classified with reference to the party who is to receive the benefit into three classes, which will include all the principles of the law of bailments. The various kinds of bailments in the Roman classification group themselves naturally under these three heads, and it will be convenient

<sup>148</sup> Story, Bailm. § 3.

<sup>149</sup> Story, Bailm. § 10.

to sometimes use the Roman terms to indicate subdivisions. The classification adopted in this book, therefore, is as follows:

### CLASSIFICATION WITH REFERENCE TO BENEFIT.

10. The rights and liabilities of the parties to a bailment depend primarily upon which party the bailment is intended to benefit. Bailments may therefore be divided into three classes:

- (a) Bailments for the bailor's sole benefit, including
  - (1) Depositum, and
  - (2) Mandatum.
- (b) Bailments for the bailee's sole benefit, including
  - (1) Commodatum.
- (c) Bailments for mutual benefit, including
  - (1) Pignus, and
  - (2) Locatio.

*this is a classification rather than an enumeration.*

Bailments for the sole benefit of the bailor, including deposits and mandates, will be considered in chapter 2. Bailments for the sole benefit of the bailee, that is, gratuitous loans, will be considered in chapter 3. Bailments for the mutual benefit of bailor and bailee, which is by far the most important and numerous class of bailments, will occupy the remainder of the book. Pignus or pledge, the first subdivision of this class, will be considered in chapter 4. Locatio or hiring will be treated in chapter 5. Innkeepers, a branch of locatio, and carriers of goods, another branch of locatio, including common carriers and the post-office department, will be treated of in chapters 6 and 7, respectively. Carriers of passengers will be considered in chapter 8, and actions against carriers in chapter 9, thus rendering the treatment of carriers complete.

*End Tues Jan 7th*

*Locatio: 1. Innkeeper 2. Postal Service.  
3. Railroads.*

## CHAPTER II.

### BAILMENTS FOR SOLE BENEFIT OF BAILOR.

11. Depositum and Mandatum.
- 12-13. Establishment of Relation.
14. Rights and Liabilities of Parties.
  - (a) Bailor must Indemnify Bailee against Expense.
  - (b) Bailee may Bind Bailor by Contract.
  - (c) Damage Sustained in Executing Bailment.
  - (d) Liability for Misfeasance and Nonfeasance.
  - (e) Right of Bailee to Use Property.
  - (f) Special Property of Bailee—Right of Action.
  - (g) Liability for Negligence.
15. Termination of Bailment.
- 16-17. Redelivery.

### DEPOSITUM AND MANDATUM.

11. Bailments for the sole benefit of the bailor include
- (a) Depositum (p. 38), and
  - (b) Mandatum (p. 40).

Where the subject of bailments is treated under the Roman classification, bailments for the sole benefit of the bailor are comprised in the two classes known as "depositum" and "mandatum."<sup>1</sup> The two classes may well be treated together, for the degree of diligence required is the same in each case, the only substantial differences in the rights and duties of the parties being such as are natural and obvious in view of the difference in the purpose of the bailments.

#### *Depositum.*

A deposit is defined by Sir William Jones<sup>2</sup> as being a naked bailment of goods, to be kept for the bailor without reward, and to be returned when he shall require it; but Judge Story<sup>3</sup> suggests as a correction that it is "a bailment of goods to be kept by the bailee

<sup>1</sup> Story, Bailm. § 3.

<sup>2</sup> Jones, Bailm. 36.

<sup>3</sup> Story, Bailm. § 41. See, also, *Whiting v. Chicago, M. & St. P. Ry. Co.*, 5 Dak. 90, 37 N. W. 222; *Bunnell v. Stern*, 122 N. Y. 539, 25 N. E. 910.

without reward, and delivered according to the object or purpose of the original trust." In his reason for this amendment, Judge Story embodies the fact emphasized in the definition of bailment as laid down in the first pages of this book;<sup>4</sup> namely, that, on the termination of a bailment, the thing may either be returned to the bailor, or be delivered over to some third party, specified by the bailor. The definition given by Pothier<sup>5</sup> is that a deposit is a contract by which one of the contracting parties gives a thing to another to keep, who is to do so gratuitously, and obliges himself to return it when he shall be requested. Ulpian<sup>6</sup> gives as a definition: "Depositum est quod custodiendum alicui datum est" (It is a deposit because it is given to some one to keep). There are various other definitions of a deposit, but enough have been given to show the commonly accepted ideas as to the nature of a deposit, and also that, in the delivery of a thing to be held as a deposit, there was no duty demanded of the bailee towards the thing intrusted to him further than that of keeping for the bailor.<sup>7</sup>

In cases of deposits, the bailor is usually called the "depositor," and the bailee the "depository." The common depositaries are finders of lost goods,<sup>8</sup> receptors,<sup>10</sup> and banks receiving special depos-

<sup>4</sup> Ante, p. 4.

<sup>5</sup> Poth. *Traité de Dépôt*, note 1.

<sup>6</sup> Com. Dig. lib. 16, tit. 3, b. (1); Story, *Bailm.* § 43.

<sup>7</sup> *Thibaud v. Thibaud*, 1 La. 493. A., as the agent of B., deposits a sum of money with C., with a request that he will keep it until B. returns home (he being absent at the time), and then pay it to him, which C. agrees to do. Held, that C. is a depository, and not liable to be sued for the money by B. until after a request to pay it. *Montgomery v. Evans*, 8 Ga. 178. If a person consents that a deposit of money shall be made in his name in a bank, for the purpose of accommodating the owner, with no control over it other than to draw it out when the owner should direct, he will not be held liable for its safe-keeping. *Dustin v. Hodgen*, 38 Ill. 352.

<sup>8</sup> *Cory v. Little*, 6 N. H. 213; *Dougherty v. Posegate*, 3 Iowa, 88. The finder of property on land is a bailee thereof without reward. The owner is liable to the finder, however, for the necessary expenses of preserving the property if the owner reclaims it. *Chase v. Corcoran*, 106 Mass. 286. But the finder has no lien for his expenses. 2 Bl. Comm. 274. He has a lien for any certain reward offered by the owner. *Wentworth v. Day*, 3 Metc. (Mass.) 352. But not when the offer is merely of a "liberal" reward. *Wilson v. Guyton*, 8 Gill, 213.

<sup>10</sup> A receptor is primarily liable as a bailee without hire. Thus, in *Brown*

its.<sup>11</sup> An ordinary deposit of money in a bank on account must not be confused with this class of bailments. Such a deposit creates the relation of debtor and creditor, and not that of bailor and bailee.<sup>12</sup> It is not a bailment, for the identical money need not be returned. But where property such as gold, bonds, stocks, or other things of value, or even money, is deposited with a bank on the understanding that the identical thing deposited is to be returned, it is called a "special deposit," and constitutes a bailment.<sup>13</sup>

#### *Mandatum.*

The second division of bailments for the sole benefit of the bailor was known to the civil law under the title of "*mandatum*," which word was anglicized by Sir William Jones in his "Essay" on Bailments, and which has been subsequently used by almost all writers on the subject, as a "*mandate*."<sup>14</sup> Various definitions have been

*v. Cook*, 9 Johns. (N. Y.) 361, a constable, having taken goods on an execution against B., delivered them to C., who gave a receipt for them, promising to deliver them to the constable on demand. The constable suffered the execution to expire without making any demand for the goods. In an action brought by the constable against C., it was held that he was a mere naked bailee, and that no action would lie against him until after a demand and refusal of the goods. If a chattel be taken from one who receipts and promises in writing to redeliver it, by another who has a paramount title, the bailee is discharged. *Edson v. Weston*, 7 Cow. (N. Y.) 278. The liability of a receiptor to a sheriff is as broad as his covenant, and is dischargeable only by act of God or the public enemy. *Cornell v. Dakin*, 38 N. Y. 253.

<sup>11</sup> See post, p. 47.

<sup>12</sup> *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Carroll v. Cone*, 40 Barb. (N. Y.) 220; *Phoenix Bank v. Risley*, 111 U. S. 125, 4 Sup. Ct. 322. "The primary relation of a depositor in a savings bank to the corporation is that of creditor, and not that of a beneficiary of a trust. The deposit when made becomes the property of the corporation. The depositor is a creditor for the amount of the deposit, which the corporation becomes liable to pay, according to the terms of the contract under which it is made." Andrews, J., in *People v. Mechanics' & Traders' Sav. Inst.*, 92 N. Y. 7, 9. And see *Chapman v. White*, 6 N. Y. 412, 417.

<sup>13</sup> *Foster v. Essex Bank*, 17 Mass. 479; *First Nat. Bank v. Graham*, 79 Pa. St. 106; *Scott v. National Bank of Chester Valley*, 72 Pa. St. 471; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278.

<sup>14</sup> Jones, Bailm. 52. The term "*mandate*" is sometimes used in a sense not denoting a bailment relation at all. "The Roman mandate in fact—a term apparently derived from the fiction of giving one's right hand as sym-



given of this species of bailment by different writers, among the most prominent of which is that originated by Lord Holt in the case of *Coggs v. Bernard*,<sup>15</sup> in which a mandate is stated by him to be "a delivery of goods or chattels to somebody who is to carry them or do some act about them gratis, without any reward for such work or carriage." This definition is practically adopted by Sir William Jones<sup>16</sup> when he says that a mandate is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them. According to Kent,<sup>17</sup> "a mandate is when one undertakes, without recompense, to do some act for another, in respect to the thing bailed."

*Deposit and Mandate Distinguished.*

While closely allied, there was yet, according to the majority of writers, an important distinction between a mandate and a deposit, as to their respective purposes. This, according to Sir William

bolical of giving to another authority to act—meant in the vernacular simply to constitute a gratuitous agency. A wide, sweeping class of trusts was this, not confined to personalty, nor to things specific as distinguishable from property in the mass, nor necessarily occupied with property at all. An unpaid carrier was for the time being a mandatary; but so, too, was an unpaid oral messenger or a naked attorney." Schouler, *Bailm.* p. 30. At civil law and under the Louisiana code such a mandate was not necessarily gratuitous. Schouler, *Bailm.* p. 30. See *Waterman v. Gibson*, 5 La. Ann. 672; *Lafourche & T. Nav. Co. v. Collins*, 12 La. Ann. 119. With mandates of this class we are not specially concerned, though many of the principles applicable to bailments are also applicable here.

<sup>15</sup> 2 Ld. Raym. 909. And see *Conner v. Winton*, 8 Ind. 315.

<sup>16</sup> Jones, *Bailm.* 117.

<sup>17</sup> 2 Kent, Comm. (12th Ed.) 568. A mandate is a contract by which one commits a lawful business to the management of another who undertakes to perform the service gratuitously. *Richardson v. Futrell*, 42 Miss. 525; *McCauley v. Davidson*, 10 Minn. 418, 421 (Gil. 335); *Eddy v. Livingston*, 35 Mo. 487, 492; *Bronnenburg v. Charman*, 80 Ind. 475, 477. Where one carried gold dust as a favor from California to New Orleans, to be delivered to a third person, and the mandator gave the mandatary the privilege of converting the gold dust into coin, such a conferring of power did not change the relationship of bailor and bailee into that of debtor and creditor. *Goodenow v. Snyder*, 3 G. Greene (Iowa) 599. Delivery of a horse to a farrier, who gratuitously offers to cure him, is bailment of the horse, and the farrier becomes a mandatary. *Conner v. Winton*, 8 Ind. 315.

Jones,<sup>18</sup> was the fact that a mandate lay in feasant, and a deposit merely in custody. Judge Story,<sup>19</sup> in a very clear and able manner, points out the fact that the existence of this distinction is exceedingly doubtful. "In cases of deposit," says he, "something almost always remains to be done, besides a mere passive custody. If the deposit is perishable, labor must be performed to keep it in proper order. If it is a living animal, as a horse, suitable food and exercise must be given to it. In the next place, in mandates there is commonly custody; the possession of the thing being generally indispensable to the performance of the act intended by the parties, so that in each contract there is custody, and labor and service to be performed. The true distinction between them is that in the case of a deposit the principal object of the parties is the custody of the thing, and the service and labor are merely accessorial; in the case of a mandate, the labor and service are the principal objects of the parties, and the custody of the thing is merely accessorial."

The meaning of the terms "depositum" and "mandatum," as used in modern works on bailments, is not wholly synonymous with their meaning in the old civil law; and Mr. Schouler<sup>20</sup> regards the terms as so permanently associated with the meaning attached to them in the civil law as to be rather misleading than otherwise.

#### ESTABLISHMENT OF RELATION.

12. Bailments for the sole benefit of the bailor may be created

- (a) By contract (p. 42), or
- (b) By operation of law (p. 43).

13. In addition to the elements common to all bailments, the absence of intended compensation to the bailee is essential to the creation of a bailment of this class (p. 44).

#### *By Contract.*

Bailments for the sole benefit of the bailor are perhaps usually created by express contract. The bailee usually expressly agrees

<sup>18</sup> Jones, Bailm. 53.

<sup>19</sup> Story, Bailm. § 140.

<sup>20</sup> Schouler, Bailm. § 26.



to keep the thing deposited, or to transport or repair it, as the case may be.<sup>21</sup> When the bailment is thus created by express contract, the ordinary rules as to parties capable of contracting apply. Infants, married women, and persons non compos mentis cannot make themselves liable on a bailment contract,<sup>22</sup> though where actual possession of the goods is acquired the law imposes certain obligations independent of the contract.<sup>23</sup> Where the bailment is made through agents, such agents must have authority to bind their principals.<sup>24</sup> If the contract is with a corporation, the transaction must not be *ultra vires*.<sup>25</sup>

*By Operation of Law.*

It has been seen that bailments may be created by operation of law, independently of any express contract between the parties.<sup>26</sup> Bailments of this class are called quasi or constructive bailments. They are created by law, usually for the sole benefit of the bailor, and in such cases are substantially deposits. If the law, however, awards the bailee compensation, as in the case of salvage for property saved at sea, the bailment is one for mutual benefit, and is a *locatio* or hiring.<sup>27</sup> As has been seen, the law will not impose the liabilities of a bailee on one unless he voluntarily accepts possession of the goods. No man can be made a bailee of another's property without his consent. The finder of goods lost is under no obligation to take them into his custody; but if he voluntarily assumes the care of them, he is burdened with the liabilities of a depositary.<sup>28</sup> The liability of the bailee in quasi or constructive bailments is imposed by operation of law and not by contract, and therefore the capacity of the parties is immaterial except in its effect upon the question of what constitutes due care. Due care has reference, *inter alia*, to the capacity and class of the parties.<sup>29</sup>

<sup>21</sup> *Lethbridge v. Phillips*, 2 Starkie, 544; *Foster v. Bank*, 17 Mass. 478.

<sup>22</sup> *Ante*, p. 16.

<sup>23</sup> *Mills v. Graham*, 1 Bos. & P. 140. And see *Towne v. Wiley*, 23 Vt. 355.

<sup>24</sup> See *ante*, p. 18.

<sup>25</sup> See *ante*, p. 20.

<sup>26</sup> *Ante*, p. 18.

<sup>27</sup> *Post*, p. 177.

<sup>28</sup> *Dougherty v. Posegate*, 3 Iowa, 88. And see *ante*, p. 13.

<sup>29</sup> 2 Jag. Torts, 826.

*Same—Involuntary Deposits.*

There is another class of bailments by operation of law which Story aptly calls "involuntary deposits." These arise whenever the goods of one person have by an unavoidable casualty or accident been lodged upon another's land, as where lumber floating in a river is cast upon a neighbor's land by a sudden freshet and left there, or where goods are blown upon another's land by a tempest.<sup>30</sup> The rights and liabilities of the parties in this class of cases are not very well settled. But it would seem that the owner of the land is a quasi bailee with liabilities similar to those of a finder of lost property. If he should refuse to deliver the goods to their owner or to permit him to remove them, he might be held liable for conversion.<sup>31</sup> So, also, the owner might enter and take them away, the entry being authorized by necessity.<sup>32</sup> But if goods are cast upon another's land, through the negligence or wrong of their owner, he is liable for trespass, and has no right to enter to remove them.<sup>33</sup> So, also, it would seem that he should be liable in trespass if he fails to remove his goods after due notice, though they were cast there originally without his fault.

*Absence of Intended Compensation.*

In this class of bailments it is of the very essence of the contract that the proposed custody or services be gratuitous.<sup>34</sup> A person becomes a bailee for hire when he takes property into his care and custody for a compensation. The nature and amount of the compensation are immaterial.<sup>35</sup> The law will not inquire into

<sup>30</sup> *Anthony v. Haney*, 8 Bing. 186; *Mitten v. Faudrye*, Poph. 161 (same case as *Millen v. Hawery*, Latch, 13); *Nicholson v. Chapman*, 2 H. Bl. 254.

<sup>31</sup> *Nicholson v. Chapman*, supra; *Anthony v. Haney*, supra; *Read v. Smith*, 2 N. B. 288.

<sup>32</sup> *Mitten v. Faudrye*, Poph. 161, Latch, 13.

<sup>33</sup> *Anthony v. Haney*, 8 Bing. 186. And see *Jag. Torts*, 149.

<sup>34</sup> *Wilson v. Wilson*, 16 La. Ann. 155; *Lafourche & T. Nav. Co. v. Collins*, 12 La. Ann. 119; *Mariner v. Smith*, 5 Heisk. (Tenn.) 203; *Pattison v. Bank*, 4 Thomp. & C. (N. Y.) 96; *Lobenstein v. Pritchett*, 8 Kan. 213. But see *Waterman v. Gibson*, 5 La. Ann. 672. A mandatary cannot recover on a quantum meruit. *Wilson v. Wilson*, 16 La. Ann. 155.

<sup>35</sup> If there be compensation, express or implied, certain or uncertain in amount, the contract is a contract for hire. *Newhall v. Paige*, 10 Gray (Mass.) 366; *Ouderkirk v. Central Nat. Bank* (Sup.) 4 N. Y. Supp. 734; *Hol-*

its sufficiency, or the certainty of its being realized by the bailee. The real question is, was the contract made for a consideration? If so, then it is a locatio, and not a depositum or mandatum, and the bailee is liable for a want of the ordinary care demanded from bailees for hire. The general rules as to the consideration of a contract are well understood, and are the same in the case of bailments as in all other contracts. The law does not attempt to determine the adequacy of a consideration. That is left to the parties, who are the sole judges of the benefits or advantages to be derived from their contracts. It is sufficient if the consideration be of some value, though slight, or of a nature which may inure to the benefit of the party making the promise. A mere contingent benefit is sufficient to make a bailment one for hire. When such a consideration exists, a contract cannot be said to be nudum pactum, nor a bailment a gratuitous undertaking.<sup>36</sup>

The intent of the parties is of course the important thing. This is a question of fact, to be determined in view of all the circumstances.<sup>37</sup> Where a person has acted as bailee in a matter not within the scope of his ordinary occupation, it is incumbent upon the bailor who seeks to render him liable for negligence as a bailee for hire to prove that he was to receive a compensation.<sup>38</sup> But where the bailment was in the line of the bailee's business, for which he regularly received compensation, his right to compensation will be implied, and the bailment will be for mutual benefit, though nothing was said as to a charge for services.<sup>39</sup> The bailee, when

*lister v. Central Nat. Bank* (Sup.) 4 N. Y. Supp. 737; *Keller v. Rhoads*, 39 Pa. St. 513; *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810. But see *Comp v. Bank*, 94 Pa. St. 409.

<sup>36</sup> *Newhall v. Paige*, 10 Gray (Mass.) 366. And see *Chamberlin v. Cobb*, 32 Iowa, 161; *Francis v. Shrader*, 67 Ill. 272; *White v. Humphery*, 11 Q. B. 43.

<sup>37</sup> *Lobenstein v. Pritchett*, 8 Kan. 213; *Mariner v. Smith*, 5 Helsk. (Tenn.) 203; *Pattison v. Syracuse Nat. Bank*, 4 Thomp. & C. (N. Y.) 96; *Kinchelo v. Priest*, 89 Mo. 240, 1 S. W. 235.

<sup>38</sup> *Dart v. Lowe*, 5 Ind. 131.

<sup>39</sup> *Pattison v. Bank*, 4 Thomp. & C. (N. Y.) 96; *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452; *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatchf. 362, Fed. Cas. No. 12,602; *Rea v. Trotter*, 26 Grat. 585. If a package containing money be handed to the captain of a steamboat, which is in the habit of charging freight for carrying remittances of money, without informing him of

sued by the bailor for negligence, cannot set up a mental reservation not to charge for his services, and thus relieve himself of the duty of exercising ordinary diligence.<sup>40</sup> All attendant circumstances calculated to throw light on the real intent of the parties should be given due weight. It is more probable, for instance, that a relative or personal friend would do another a favor gratuitously, than that a stranger would do so. Where but little time, skill, and trouble are involved, one might undertake a commission without reward which he would not do if the labor were considerable.<sup>41</sup>

### *General Requisites.*

The only characteristic feature of bailments for the sole benefit of the bailor is the entire absence of any compensation to the bailee. This serves to fix the standard of his liability at slight diligence; for, as has been seen, the measure of diligence required of bailees varies with the presence or absence of compensation.<sup>42</sup> In all other respects, the principles governing the formation of bailments of this class are common to all other classes of bailments. Thus, the subject-matter of the bailment must be personalty, either corporeal or incorporeal.<sup>43</sup> So, also, there must be an actual or constructive delivery of the property, and a voluntary acceptance by the bailee.<sup>44</sup> The delivery is the inception of the bailment. The

its contents, and the package is lost, the owners of the vessel are not liable. *Mechanics' & Traders' Bank v. Gordon*, 5 La. Ann. 604. Public officers who receive property in the course of their official duty are held to be bailees for hire. *Aurentz v. Porter*, 56 Pa. St. 115; *Browning v. Hanford*, 5 Denio (N. Y.) 586; *Witowski v. Brennan*, 41 N. Y. Super. Ct. Rep. 284; *Moore v. Westervelt*, 27 N. Y. 234; *Wood v. Bodine*, 32 Hun, 354.

<sup>40</sup> *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatchf. 362, Fed. Cas. No. 12,602; *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452.

<sup>41</sup> *Dart v. Lowe*, 5 Ind. 131; *Lafourche & T. Nav. Co. v. Collins*, 12 La. Ann. 119. A mere volunteer, under no legal obligation to take and store goods, who accepts the temporary custody of them without any agreement on the subject, has no lien on them for storage. *Rivara v. Ghio*, 3 E. D. Smith (N. Y.) 264.

<sup>42</sup> Ante, p. 23.

<sup>43</sup> Story, Bailm. § 51; ante, p. 10.

<sup>44</sup> *Belmont Coal Co. v. Richter*, 31 W. Va. 858, 8 S. E. 609. But see *Schermer v. Neurath*, 54 Md. 491. "The master and owner of a house or warehouse, allowing his servants or clerks to receive for custody the goods of another, and especially if the practice be general and unlimited, as is the

rights and liabilities of the parties become fixed immediately upon the delivery and acceptance. The intention of the parties at that time controls the character of the bailment.<sup>46</sup> It is not essential that a bailor should have an absolute title in the thing in order to make a valid bailment for his own benefit. A special property in it, or even the bare possession of it, is sufficient.<sup>46</sup> A person who holds property by a wrong, and without title, may lawfully deposit it, and will be entitled to recover it back, as against every one but the rightful owner. As between the parties, all the rights and liabilities incident to a bailment relation exist.<sup>47</sup>

#### *Special Bank Deposits.*

Special bank deposits constitute, perhaps, the most important kind of bailment for the bailor's sole benefit. The deposit of gold, stocks, bonds, or other things of value with a bank, with the understanding that the identical thing shall be returned, is of common occurrence. The transaction constitutes a bailment.<sup>48</sup> *Foster v.*

*case with banks in relation to special deposits, will be considered the bailee of the goods so received, and will incur the duties and liabilities belonging to that relation. Not so if the servant, secretly and without the knowledge, express or implied, of the master, he not having authorized or submitted to the practice, receives the goods for such purpose; for no man can be made the bailee of another's property without his consent."* *Foster v. Essex Bank*, 17 Mass. 479. In *Pattison v. Syracuse Nat. Bank*, 4 Thomp. & C. (N. Y.) 96, which was an action to recover certain bonds which were stolen from the bank where they had been deposited by the plaintiff for safe-keeping, it was held that the question as to whether the teller who received the bonds did so in an official or personal capacity was a question for the jury. In *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106, which was an action of assumpsit to recover the value of certain bonds left by the plaintiff with the bank for safe-keeping, it was held by the court that "the mere voluntary act of the cashier in receiving the plaintiff's securities would not subject the bank to liability. But if the deposit was known to the directors, and they acquiesced in its retention, a contract relation was created by which the defendants should be held bound."

<sup>45</sup> *Rutgers v. Lucet*, 2 Johns. Cas. (N. Y.) 92.

<sup>46</sup> *Armory v. Delamirie*, 1 Strange, 505; *Rooth v. Willson*, 1 Barn. & Ald. 59.

<sup>47</sup> *Tancil v. Seaton*, 28 Grat. (Va.) 601.

<sup>48</sup> *Smith v. Bank*, 99 Mass. 605; *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106; *First Nat. Bank v. Rex*, 89 Pa. St. 308; *Lancaster Co. Nat. Bank v. Smith*, 62 Pa. St. 47; *Scott v. Bank*, 72 Pa. St. 471; *De Haven v. Kensington*, 81 Pa. St. 95; *Dearborn v. Bank*, 61 Me. 369; *Maury v. Coyle*, 34 Md.



Essex Bank <sup>49</sup> is the leading case on this subject. In that case, gold which had been left at the bank in several bags as a special deposit for safe-keeping was stolen by the cashier. It was held in an action against the bank that the bank was not liable for the loss of the gold. The following principles were laid down: Corporations doing a general banking business have an implied power to receive special deposits for safe-keeping. The cashier cannot bind the bank by receiving such special deposits without authority, express or implied, to do so; <sup>50</sup> but such authority may be implied where the cashier has been in the habit of receiving such deposits, and the directors, knowing of such custom, allow it to continue. <sup>51</sup> Where such deposits are regularly received, the bank, and not its officers, is the bailee. The bank is liable for the loss of such deposits through the negligence of its agents, but not for a loss through the fraudulent or felonious acts of its agents. <sup>52</sup>

235. In the absence of any explanatory evidence, an instrument signed by a depositary, by which he acknowledges that a third person has deposited with him for "safe-keeping" a certain number of dollars in gold coin, which depositary is to "return whenever called for," will be held a special deposit. *Wright v. Paine*, 62 Ala. 340. By a subsequent contract a special deposit may be turned into a general one. *Chiles v. Garrison*, 32 Mo. 475. An agreement that the depositary shall pay interest on the deposit makes the transaction of special deposit one of open account. *Howard v. Roeben*, 33 Cal. 399.

<sup>49</sup> 17 Mass. 497.

<sup>50</sup> *Lloyd v. Bank*, 15 Pa. St. 172; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369.

<sup>51</sup> *First Nat. Bank v. Graham*, 79 Pa. St. 106; *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369.

<sup>52</sup> See ante, p. 18. The doctrine of *Foster v. Essex Bank* was criticised in *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162. The court, in speaking of thefts by bank employ  s of special deposits made in the bank, said: "The doctrine of exemption from liability in such cases was at one time carried so far as to shield the bailees from the fraudulent acts of their own officers and employ  s, although their employment embraced a supervision of the property, such acts not being deemed within the scope of their employment." And the court held the bank liable for a special deposit of bonds stolen by the assistant cashier, who was to the knowledge of the management speculating on the board of trade, and whose accounts with the bank the directors investigated at the same time, leaving the special deposits unexamined. And that case was followed in *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810. And



These principles have become well established. It is safe to say that the reception of special deposits is outside of a bank's ordinary course of business, and it is not within the scope of the general powers or apparent authority of its executive or ministerial officers to bind the corporation by a contract for such a bailment. In the absence, therefore, of proof that special authority has been delegated by its board of directors, or has been exercised with their sanction or knowledge, or of evidence that it had been the habit and practice of the corporation to receive property for safe-keeping, it is not responsible for property so received by its cashier.<sup>53</sup> Neither a corporation nor an individual is responsible for neglect in protecting property of which he or it has not assumed the custody or any relation of duty or trust in regard to.<sup>54</sup>

*Same—National Banks.*

It was at one time doubted whether national banks organized under the national banking act had the power to receive special deposits to keep merely for the accommodation of the depositor. Thus, in *Whitney v. First National Bank*<sup>55</sup> it was held that the act conferred neither express nor implied authority to receive such deposits, and, therefore, that the cashier could not bind the bank by such a contract, though made with the knowledge and acquiescence of the directors; the court saying that such a contract was entirely foreign to the purpose of the corporation, and, if made by or on behalf of the bank, was *ultra vires*, and imposed no legal obligation or duty upon the corporation as bailee.<sup>56</sup> The question was settled, however, by the supreme court of the United States in *National Bank v. Graham*,<sup>57</sup> the court holding that national banks have implied power to receive such deposits.

see *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368; *Scott v. Bank*, 72 Pa. St. 471; *First Nat. Bank v. Rex*, 89 Pa. St. 308.

<sup>53</sup> *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Foster v. Bank*, 17 Mass. 479; *Scott v. Bank*, 72 Pa. St. 471; *Lloyd v. Bank*, 15 Pa. St. 172.

<sup>54</sup> *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278.

<sup>55</sup> 50 Vt. 388; s. c., 55 Vt. 154.

<sup>56</sup> And see *Wiley v. Bank*, 47 Vt. 546. But see *Third Nat. Bank v. Boyd*, 44 Md. 47.

<sup>57</sup> 100 U. S. 699. And see *Pattison v. Bank*, 80 N. Y. 82; *First Nat. Bank v. Bank*, 60 N. Y. 278.

## RIGHTS AND LIABILITIES OF PARTIES.

14. The rights and liabilities of the bailor and bailee depend primarily upon the special contract in each case. The following principles, however, are common to all bailments for the bailor's sole benefit, unless varied by the special contract:

- (a) The bailor must indemnify the bailee against necessary expenses incurred in the performance of the bailment (p. 51).
- (b) The bailee has implied authority to contract for and bind the bailor where the contract is necessary for the preservation and care of the property (p. 52).
- (c) The bailor is not liable to the bailee for damages sustained in the execution of the bailment contract, unless he negligently exposed the bailee to danger without warning (p. 53).
- (d) The bailee is liable for misfeasance, but not for nonfeasance (p. 54).
- (e) The bailee has no right to use the property bailed, except in so far as such use is incidental to the proper performance of his duties (p. 57).
- (f) The right of property in the thing bailed remains in the bailor. The bailee has not even a special property therein, but merely a possessory interest. Either party, however, may maintain an action for an injury to or conversion of the thing bailed (p. 58).
- (g) The due care demanded from the bailee consists merely in the exercise of slight diligence (p. 61).

*In General.*

The rights and liabilities of bailor and bailee in this class of bailments may well be considered together. The bailee plays by far the most important part in the transaction, and in the discussion of his rights and liabilities those of the bailor will incidentally appear. The rights and liabilities of both parties are, of course,

primarily dependent upon the contract they have made. The instructions of the bailor accompanying the delivery and the terms of acceptance imposed by the bailee are binding upon both parties. The bailee, in the absence of an express agreement, as the contract is wholly gratuitous, and for the benefit of the bailor, is bound only to slight diligence, and responsible only for gross negligence.<sup>58</sup> This general responsibility may be varied, however, by a special contract of the parties, either enlarging or qualifying it; and in such cases the particular contract will form the rule for the case.<sup>59</sup> The contract, however, must not be against public policy. A gratuitous bailee cannot contract against liability for his own gross negligence or fraud.<sup>60</sup> The bailee's liability will not be enlarged by words of doubtful import.<sup>61</sup> Thus, a bailment to keep is not the same thing as a bailment to keep safely. But the words "to secure and take care of" or "for safe-keeping" have been held not to be special agreements for more than the legal measure of diligence appropriate to the bailment.<sup>62</sup>

*Bailor must Indemnify Bailee against Expense.*

While bailees for the sole benefit of the bailor are not entitled to any compensation for their services, they are entitled to recover their actual disbursements and expenses necessarily incurred for the preservation of the deposit or performance of the mandate.<sup>63</sup> This is naturally implied in the undertaking, because a gratuitous

<sup>58</sup> See post, p. 61.

<sup>59</sup> *Ferguson v. Porter*, 3 Fla. 27; *McCauley v. Davidson*, 10 Minn. 418 (Gil. 335); *Fellowes v. Gordon*, 8 B. Mon. 415; *Archer v. Walker*, 38 Ind. 472.

<sup>60</sup> *Pattison v. Bank*, 4 Thomp. & C. (N. Y.) 96. A depositary cannot contract so as to absolve himself altogether from liability. *Lancaster Co. Nat. Bank v. Smith*, 62 Pa. St. 47.

<sup>61</sup> *Treffitz v. Canelli*, L. R. 4 P. C. 277; *Whitney v. Lee*, 8 Metc. (Mass.) 91; *Ames v. Belden*, 17 Barb. (N. Y.) 513.

<sup>62</sup> *Whitney v. Lee*, 8 Metc. (Mass.) 91. And see *Ross v. Hill*, 2 C. B. 877.

<sup>63</sup> *Story*, Bailm. §§ 121, 154; *Devalcourt v. Dillon*, 12 La. Ann. 672; *Harter v. Blanchard*, 64 Barb. (N. Y.) 617. Where A. deposits in B.'s hands merchandise to be sold, and the proceeds to be applied to the extinguishment of A.'s debt to B., the transaction is a case of mandate, and B. is entitled to all necessary expenses that have been incurred in fulfilling the object of the mandate. *Devalcourt v. Dillon*, supra. But see 2 Pars. Cont. (5th Ed.) 96, note x.

act would otherwise become a burden. It is immaterial that the expenses were greater than the owner himself would have paid, if they were reasonably incurred, or that the bailor has not derived the expected benefit from the execution of the trust, if the failure was not caused by the fault of the bailee.<sup>64</sup> So, also, the bailor must indemnify the bailee against liability on contracts which are incidental to the performance of the bailment. Thus, in the case of a mandate, where the bailor requested the bailee to take a package of goods with him on a journey, and the latter contracted with the carrier to pay the freight, the bailor must indemnify him against liability on such contract.<sup>65</sup>

At common law the bailee had no lien for such expenses, but might claim and recover them in an action.<sup>66</sup> But, where the owner of lost property offers a reward for its return, the finder has a lien for the amount of the reward, provided a specific sum was named.<sup>67</sup> If no particular sum was offered, but merely a liberal reward, there is no lien.<sup>68</sup>

*Bailee may Bind Bailor by Contract.*

All contracts made with third persons by the bailee in the execution of his agency and within the scope of his authority are binding upon the bailor, and must be fulfilled by him when he is made a contracting party. It springs from the very relation of bailor and bailee that the latter necessarily has authority to contract for and bind the bailor, when necessary for the preservation and care of the property. Thus, it was held in a case where a horse, being pastured by a bailee without reward, broke his leg, that the bailee had implied authority to contract, in behalf of the bailor, with a competent farrier, having suitable accommodations, for the care and

<sup>64</sup> Story, Bailm. § 197.

<sup>65</sup> Story, Bailm. § 198.

<sup>66</sup> Nicholson v. Chapman, 2 H. Bl. 254; Reeder v. Anderson, 4 Dana (Ky.) 193; Amory v. Flynn, 10 Johns. (N. Y.) 102; Etter v. Edwards, 4 Watts, 63; Chase v. Corcoran, 106 Mass. 286.

<sup>67</sup> Wentworth v. Day, 3 Metc. (Mass.) 352; Cummings v. Gann, 52 Pa. St. 484.

<sup>68</sup> Willson v. Guyton, 8 Gill (Md.) 213. But no compensation can be claimed unless a reward is offered. Watts v. Ward, 1 Or. 86; Amory v. Flynn, 10 Johns. (N. Y.) 102.

keeping of the horse, and to bind the bailor by such contract until the latter could be informed of the injury, and had time and opportunity to make other provision for the care of the horse.<sup>69</sup>

*Damage Sustained in Executing Bailment.*

There is some confusion of ideas as to the right of the bailee to recover for damages sustained by him in the execution of the trust. The general statement of the rule seems to be that the bailor is liable to the bailee for all damages the proximate cause of which was the performance of the bailment contract. It is sometimes said that the bailor is liable when the execution of the trust was the cause, but not when it was merely the condition or occasion of the loss.<sup>70</sup> But, as a recent writer has pointed out, the distinction is merely a verbal one, for the only standard by which what is a cause and what is a condition can be determined is the same as that which determines a proximate from a remote cause.<sup>71</sup> The simplest statement of the rule, therefore, is that the bailor is liable to the bailee for all damages sustained by him which are the natural and probable—i. e. proximate—result of executing the bailment contract. This seems to be the substance of the rule at civil law, but it is difficult to see upon what principle of the common law the liability can be maintained in the absence of express contract or some negligence on the part of the bailor in exposing the bailee to danger without warning. At common law, liability is imposed in but two ways: First, by consent, as in cases of contracts;<sup>72</sup> second, by operation of law, in connection with a legal wrong or tort.<sup>73</sup> Now, it is clear that liability for damage sustained by the bailee in the execution of the bailment contract cannot be referred to consent, for, as Dr. Paley has well said, “unless the same be provided for by express stipulation, the agent is not entitled to any compensation from his employer on that account, for, where the danger is not foreseen, there can be no reason to believe that the employer engaged to indemnify the agent against it. Still less where it is foreseen, for whoever knowingly undertakes a dangerous employment, in common construction takes upon himself the danger

<sup>69</sup> Harter v. Blanchard, 64 Barb. (N. Y.) 617.

<sup>70</sup> Story, Bailm. § 200.

<sup>71</sup> Jag. Torts, 63.

<sup>72</sup> Clark, Cont. 2.

<sup>73</sup> Jag. Torts, 37.



and the consequences.”<sup>74</sup> The reasoning of the learned doctor is quite conclusive as to liability by consent. It is clear, therefore, that, if there is any liability in this class of cases, it must be referred to the second class, or liability by reason of tort. Unless the bailor has committed a legal wrong to the bailee, he is not liable to the latter for damages sustained in the course of the bailment. Damage alone is not a tort. To constitute a cause of action, there must be a conjunction of damage and conduct of a character to which the law has attached liability for injurious consequences.<sup>75</sup> In the case under discussion the conduct of the bailor consists merely in bailing the goods. No liability attaches to such a lawful act. If danger was apparent, the bailee must be held to have assumed it. It is not wrong to make a bailment of dangerous goods. If the danger was not apparent, still the bailor was guilty of no wrong, unless he knew of it, and negligently exposed the bailee to it without warning. If he did so, then he is liable for the resulting damage, for he is guilty of a breach of duty, which, when followed by damage, constitutes a tort.<sup>76</sup>

*Liability for Misfeasance and Nonfeasance.*

A bailee without reward is liable for misfeasance, but not for nonfeasance.<sup>77</sup> If one gratuitously agree to perform a mandate or accept a deposit, he is not liable for a refusal to do either, provided he has not entered upon the performance. But, if one actually enters upon the performance of the bailment contract, he must go through with it, and is liable for any failure to fulfill its terms

<sup>74</sup> Paley, Moral Phil. bk. 3, c. 12.

<sup>75</sup> Jag. Torts, 87,—citing Day v. Brownrigg, 10 Ch. Div. 294, 304; Backhouse v. Bonomi, 9 H. L. Cas. 503; Salvin v. Coal Co., 9 Ch. App. 705; Rogers v. Rajendro Dutt, 13 Moore P. C. 209; Rich v. Railroad Co., 87 N. Y. 382.

<sup>76</sup> Jag. Torts, 867.

<sup>77</sup> Nonfeasance of gratuitous undertaking creates no liability. Morrison v. Orr, 3 Stew. & P. (Ala.) 49. French v. Reed, 6 Bin. (Pa.) 308; Smedes v. Bank, 20 Johns. (N. Y.) 372; Ainsworth v. Backus, 5 Hun, 414; Thorne v. Deas, 4 Johns. (N. Y.) 84; Rutgers v. Lucet, 2 Johns. Cas. (N. Y.) 92. It was claimed by Sir William Jones that freedom of the bailee from liability for nonfeasance existed only in cases where the bailor suffered no special loss, and that where loss or damage was suffered by the bailor an action by the latter would lie. Jones, Ballm. 53, 57, 61, 120.



due to his fault.<sup>78</sup> The reason for this distinction lies in the gratuitous nature of the bailment. Until the property has been delivered to the bailee, and the performance thus entered upon, there is no consideration for his promise to become a bailee, and therefore it is not binding in law.<sup>79</sup> This doctrine was firmly established in England by the case of *Elsee v. Gatward*,<sup>80</sup> and in America by the leading case of *Thorne v. Deas*.<sup>81</sup> The able opinion of Chancellor Kent in the latter case leaves little to be said on the subject. In that case the defendant had voluntarily undertaken to get a vessel insured, but neglected to do so, and the vessel was lost. It was held that the defendant was not liable, because there was no consideration for his undertaking. Kent, C. J., said: "The chief objection raised to the right of recovery in this case is the want of a consideration for the promise. The offer on the part of the defendant to cause insurance to be effected was perfectly voluntary. Will, then, an action lie when one party intrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But the defendant never entered upon the execution of his undertaking, and the action is brought for the nonfeasance. Sir William Jones, in his *Essay on the Law of Bailments*, considers this species of undertaking to be as extensively binding in the English law as the contract of *mandatum* in the Roman law, and that an action will lie for damage occasioned by the nonperformance of a promise to become a *mandatary*, though the promise be purely gratuitous. This treatise stands high with the profession, as a learned and classical performance, and I regret that on this point I find so much reason to question

<sup>78</sup> See cases in preceding note. For applications of this principle to common-law agencies, see *Fellowes v. Gordon*, 8 B. Mon. (Ky.) 415; *McGee v. Bast*, 6 J. J. Marsh. (Ky.) 453; *Ferguson v. Porter*, 3 Fla. 27; *Wilkinson v. Coverdale*, 1 Esp. 75; *Park v. Hammond*, 4 Camp. 344; *Balfe v. West*, 13 C. B. 466.

<sup>79</sup> Schouler, *Bailm.* § 34; Story, *Bailm.* § 171a.

<sup>80</sup> 5 Term R. 143.

<sup>81</sup> 4 Johns. (N. Y.) 84.

its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged case, but only some dicta (and those equivocal) from the Year Books, in support of his opinion; and, were it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument. A short review of the leading cases will show that by the common law a mandatary, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it and does it amiss. In other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages are averred. Those who are conversant with the doctrine of *mandatum* in the civil law, and have perceived the equity which supports it and the good faith which it enforces, may, perhaps, feel a portion of regret that Sir William Jones was not successful in his attempt to ingraft this doctrine in all its extent into the English law. I have no doubt of the perfect justice of the Roman rule, on the ground that good faith ought to be observed because the employer, placing reliance upon that good faith in the mandatary, was thereby prevented from doing the act himself, or employing another to do it. This is the reason which is given in the Institutes for the rule: '*Mandatum non suscipere cuilibet liberum est; susceptum autem consummandum est, aut quam primum renunciandum ut per semetipsum aut per alium, eandem rem mandator exequatur.*'<sup>82</sup> But there are many rights of moral obligation which civil laws do not enforce, and are therefore left to the conscience of the individual, as rights of imperfect obligation; and the promise before us seems to have been so left by the common law, which we cannot alter, and which we are bound to pronounce." After a short review of the early cases, the learned judge continued: "There is, then, no just reason to infer, from the ancient authorities, that such a promise as the one before us is good, without showing a consideration. The whole current of the decision runs the other way, and from the time of Henry VII. to this time the same law has been uniformly maintained. The doctrine on this subject, in the Essay on Bailments, is true in reference to

<sup>82</sup> Co. Inst. lib. 3, 27, 11.

the civil law, but is totally unfounded in reference to the English law; and to those who have attentively examined the head of 'Mandates,' in that Essay, I hazard nothing in asserting that that part of the treatise appears to be hastily and loosely written. It does not discriminate well between the cases; it is not very profound in research, and is destitute of true legal precision."

*Same—What Constitutes Misfeasance.*

For anything amounting to a positive breach of the bailment contract, and for fraud or bad faith, the bailee is strictly liable.<sup>83</sup> Any unauthorized use or misappropriation of the property bailed constitutes a conversion.<sup>84</sup> The bailee has no authority to sell or pledge it; and if he does so he is liable for conversion,<sup>85</sup> and the owner may reclaim his goods from any person found in possession of them.<sup>86</sup> It is a breach of trust for the bailee to break open a locked chest or sealed package.<sup>87</sup> Gross negligence in the performance of the bailment contract is a misfeasance.<sup>88</sup>

*Right of Bailee to Use Property.*

In this class of bailments, the bailee has no general right to use the property bailed to him, for, if he had such a right, the bailment would become one for the mutual benefit of the bailor and bailee.<sup>89</sup> It may happen, however, that the proper keeping of the property

<sup>83</sup> *Knowing v. Manly*, 49 N. Y. 192; *Bank of Utica v. Smedes*, 3 Cow. (N. Y.) 662; *Bank of Utica v. McKinster*, 11 Wend. (N. Y.) 473; *Eddy v. Livingston*, 35 Mo. 487; *Bland v. Womack*, 2 Murph. (N. C.) 373; *Graves v. Ticknor*, 6 N. H. 537; *Persch v. Quiggle*, 57 Pa. St. 247.

<sup>84</sup> *Wilkinson v. Verity*, L. R. 6 C. P. 206; *Lockwood v. Bull*, 1 Cow. (N. Y.) 322; *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25; *Delaware Bank v. Smith*, Edm. Sel. Cas. (N. Y.) 35; *Graves v. Ticknor*, 6 N. H. 537; *Persch v. Quiggle*, 57 Pa. St. 247; *Colyar v. Taylor*, 1 Cold. (Tenn.) 372; *Clark v. Gaylord*, 24 Conn. 484.

<sup>85</sup> *King v. Bates*, 57 N. H. 446; *Dale v. Brinckerhoff*, 7 Daly (N. Y.) 45.

<sup>86</sup> *Babcock v. Gill*, 10 Johns. (N. Y.) 237.

<sup>87</sup> *Story*, Bailm. § 92; Civ. Code La. art. 2914.

<sup>88</sup> *French v. Reed*, 6 Bin. (Pa.) 308; *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106; *Whitney v. Lee*, 8 Metc. (Mass.) 92.

<sup>89</sup> *Lane v. Cameron*, 38 Wis. 603. The finder of a lottery ticket is not entitled to receive payment on it. If paid, with notice of the holder's possession by finding, it can be collected again by the rightful owner. *McLaughlin v. Waite*, 5 Wend. (N. Y.) 404.

involves a certain measure of use. Thus, horses must be exercised and cows milked.<sup>90</sup> Whatever positive profit arises from such use must be accounted for to the bailor. Yet a slight beneficial enjoyment by the bailee wholly incidental to the proper performance of his duties would probably not render the bailment one for mutual benefit. The convenience of using a horse while exercising it would seem too slight a benefit to change the character of the bailment. The substance of the matter is admirably stated by Mr. Schouler:<sup>91</sup> "Whatever use follows the delivery should be viewed, as concerns the bailee, more as a duty than a right, or as an incident rather than an object." Any attempt, however, by the bailee to act in regard to the thing as its owner, to the extent of making an improper use of it, or of disposing of it, would constitute a conversion, rendering him at once liable to the owner.<sup>92</sup>

*Special Property of Bailee—Possessory Interest—Right of Action.*

There is a good deal of confusion and conflict in the books as to whether a gratuitous bailee has a "special property" in the goods bailed, or merely a "possessory interest."<sup>93</sup> Perhaps a good deal of

<sup>90</sup> *Mores v. Conham*, Owen, 123; *Anon.*, 2 Salk. 522.

<sup>91</sup> *Ballm.* 61.

<sup>92</sup> *Dale v. Brinckerhoff*, 7 Daly (N. Y.) 45; *King v. Bates*, 57 N. H. 446. And see cases cited in the preceding paragraph.

<sup>93</sup> The owner's agent gave an old safe to a party to sell, with the privilege of using it. The depositary found a roll of bills between the casing and the lining. Held, as against the owner of the safe, the depositary could keep the money. *Durfee v. Jones*, 11 R. I. 588. A servant found money in paper stock of his employer. Held, he could hold it against his employer. *Bowen v. Sullivan*, 62 Ind. 281. And a domestic servant in a hotel who found a roll of bills in a public parlor was held entitled to them as against the hotel-keeper. *Hamaker v. Blanchard*, 90 Pa. St. 377. But in Massachusetts it was held that a finder of a pocketbook left by the owner on a table in a shop could not hold it against the shopkeeper. *McAvoy v. Medina*, 11 Allen (Mass.) 548. In an action by the husband and two children of P. against a son of the latter to recover money found on P. when she was committed to an insane asylum, it appeared that the money was given defendant by the commissioners of charities, on his agreement to keep it for his mother. Held that, as defendant received the money from the custodians of his mother's person and the property found on it, who have all the obligations of bailees, he could defend in his mother's right, and set up such defense as she might make. *Peters v. Peters*, 3 Misc. Rep. 264, 22 N. Y. Supp. 764. But if the depositary

the controversy is over terms, and the confusion comes from loosely using the phrase "special property" to mean sometimes merely a lawful possession, which may be maintained against wrongdoers. This latter sense is far from accurate. "When we speak of a person's having a property in a thing, we mean that he has some fixed interest in it (*jus in re*), or some fixed right attached to it, either equitable or legal; and, when we speak of a special property in a thing, we mean some special fixed interest or right therein, distinct from and subordinate to the absolute property or interest of the general owner."<sup>94</sup> Thus, where goods are pledged for a debt, the pledgee has a special property therein; for he has a qualified interest in the thing, coextensive with his debt, as owner *pro tanto*.<sup>95</sup> But it seems a confusion of all distinctions to say that a naked bailee, such as a depositary, has a special property, when he has no more than a lawful custody or possession of the thing, without any vested interest therein for which he can detain the property, even for a moment, against the lawful owner. The reason given for the statement that such a bailee has a special property in the goods is that he may maintain *trover*<sup>96</sup> as well as trespass against one who disturbs his possession by injuring or converting such property, and that, to maintain *trover*, the plaintiff must have either an absolute or special property in the goods which are the subject of the action; that trespass is founded on possession, and *trover* on property. Indeed, all these statements find support in the authori-

has no property whatever in the goods, yet his possession is sufficient ground for a suit against a tort-feasor. *Poole v. Symonds*, 1 N. H. 289; *Thayer v. Hutchinson*, 13 Vt. 504; *Sutton v. Buck*, 2 Taunt. 302; *Burton v. Hughes*, 2 Bing. 173. A depositary may sue one who has converted the property, though the former may not be responsible to the owner. *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114.

<sup>94</sup> Story, *Bailm.* § 93g.

<sup>95</sup> See post, p. 133.

<sup>96</sup> A receptor to whom a sheriff has intrusted for safe-keeping property attached by him on a writ against a third person may maintain *trover* against a wrongdoer. *Thayer v. Hutchinson*, 13 Vt. 504. Compare *Dillenback v. Jerome*, 7 Cow. (N. Y.) 294; *Norton v. People*, 8 Cow. (N. Y.) 137. A finder or other depositary may maintain *trover* against a person converting the article. *Armory v. Delamirie*, 1 Strange, 505; *New York & H. R. Co. v. Haws*, 56 N. Y. 175; *Brown v. Shaw*, 51 Minn. 266, 53 N. W. 633.



ties. But the distinction between trespass and trover in this regard is merely a broad generalization, which, unexplained, is misleading. In trespass, possession is indispensable to maintain the suit, and property is wholly immaterial.<sup>97</sup> In trover, possession is likewise sufficient to maintain the action; but, even without possession, trover can be maintained, provided the plaintiff has a general or special property, together with a right of possession.<sup>98</sup> If a mere depositary has not a special property in the goods, he cannot maintain replevin for them, because that action requires property in the plaintiff.<sup>99</sup> The question under discussion is not of much importance in those states that have abolished the old forms of actions, and redress all wrongs in one form of action, called a "civil action"; for, whether the bailee has a mere "possessory interest" or a "special property," it is nowhere doubted that in some form of action he may sue third persons for injuries to or conversion of the thing bailed.<sup>100</sup>

*Same—Right of Bailor to Sue.*

As has been seen, the general right of property in the thing bailed remains in the bailor. He may therefore sue for any interference with his bailee's possession, or injury to the thing bailed.<sup>101</sup> In such cases, either the bailor or the bailee may sue; but a recovery by either one is a bar to a similar action by the other.<sup>102</sup>

<sup>97</sup> Ship. Com. Law Pl. (2d. Ed.) 65; Hoyt v. Gelston, 13 Johns. (N. Y.) 141; Hanmer v. Wilsey, 17 Wend. (N. Y.) 91; Illinois & St. L. Ry., etc., Co. v. Cobb, 94 Ill. 55; Laing v. Nelson, 41 Minn. 521, 43 N. W. 476.

<sup>98</sup> Ship. Com. Law Pl. (2d Ed.) 72; Hotchkiss v. McVickar, 12 Johns. (N. Y.) 403; Stephenson v. Little, 10 Mitch. 433; Hance v. Boom Co., 70 Mich. 227, 38 N. W. 228; Chickering v. Raymond, 15 Ill. 362; Owens v. Weedman, 82 Ill. 409.

<sup>99</sup> Ship. Com. Law Pl. (2d Ed.) 112; Waterman v. Robinson, 5 Mass. 303; Holler v. Coleson, 23 Ill. App. 324; Pattison v. Adams, 7 Hill (N. Y.) 126; Lester v. McDowell, 18 Pa. St. 91.

<sup>100</sup> Fish v. Skut, 21 Barb. (N. Y.) 333; Tremont Coal Co. v. Manly, 60 Pa. St. 384. And see Rooth v. Wilson, 1 Barn. & Ald. 58.

<sup>101</sup> Thorp v. Burling, 11 Johns. (N. Y.) 285; Cary v. Hotailing, 1 Hill, 311; Ash v. Putnam, 1 Hill (N. Y.) 302.

<sup>102</sup> Green v. Clarke, 12 N. Y. 343; Chesley v. St. Clair, 1 N. H. 189.



*Bailee's Liability for Negligence.*

In bailment for the sole benefit of the bailor the law holds the bailee liable only for losses attributable to his gross negligence.<sup>103</sup> This doctrine was laid down by Lord Holt in the celebrated case

<sup>103</sup> As to deposits, see *Dunn v. Branner*, 13 La. Ann. 452; *Chase v. Ma-berry*, 3 Har. (Del.) 266; *Dougherty v. Posegate*, 3 Iowa, 88; *Green v. Hollingsworth*, 5 Dana (Ky.) 173; *Mechanics' & Traders' Bank v. Gordon*, 5 La. Ann. 604; *Foster v. Essex Bank*, 17 Mass. 479; *Edson v. Weston*, 7 Cow. (N. Y.) 278; *Sodowsky v. McFarland*, 3 Dana (Ky.) 204; *Whitney v. Lee*, 8 Metc. (Mass.) 91; *McKay v. Hamblin*, 40 Miss. 472; *Monteith v. Bissell*, *Wright* (Ohio) 411; *Spooner v. Mattoon*, 40 Vt. 300; *Davis v. Gay*, 141 Mass. 531, 6 N. E. 549; *Henry v. Porter*, 46 Ala. 293; *Hale v. Rawallie*, 8 Kan. 136. As to mandates, see *Kemp v. Farlow*, 5 Ind. 462; *McNabb v. Lockhart*, 18 Ga. 495; *Skelley v. Kahn*, 17 Ill. 170; *Conner v. Winton*, 8 Ind. 315; *Jourdan v. Reed*, 1 Iowa, 135; *Storer v. Gowen*, 18 Me. 174; *Lampley v. Scott*, 24 Miss. 528; *McLean v. Rutherford*, 8 Mo. 109; *Stanton v. Bell*, 2 Hawks (N. C.) 145; *Sodowsky v. McFarland*, 3 Dana (Ky.) 204; *Tompkins v. Saltmarsh*, 14 Serg. & R. (Pa.) 275; *Anderson v. Foresman*, *Wright* (Ohio) 598; *Tracy v. Wood*, 3 Mason, 132, Fed. Cas. No. 14,130; *McNabb v. Lockhart*, 18 Ga. 495; *Tompkins v. Saltmarsh*, 14 Serg. & R. (Pa.) 275; *Lobenstein v. Pritchett*, 8 Kan. 213. And, generally, *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Lancaster Co. Nat. Bank v. Smith*, 62 Pa. St. 47; *Griffith v. Zipperwick*, 28 Ohio St. 388; *Green v. Birchard*, 27 Ind. 483; *Knowles v. Railway Co.*, 38 Me. 55. One to whom a picture was sent without his knowledge is not liable for an accidental injury to it. *Lethbridge v. Phillips*, 2 Starkie, 544. Bailee liable only for gross negligence is still liable for actual conversion of the property. *Graves v. Smith*, 14 Wis. 5. Where a hotel clerk received and signed a return receipt for a registered letter delivered to him by a letter carrier for a guest of the hotel, and the letter was lost through his negligence, he was held liable. *Joslyn v. King*, 27 Neb. 38, 42 N. W. 756. Where one gratuitously undertakes to carry a letter containing money from one city to another, he is liable for non-delivery. *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25; *Graves v. Ticknor*, 6 N. H. 537. A ring deposited with defendant to be illegally raffled for was lost by his gross carelessness. Held, that he was liable. *Woolf v. Bernero*, 14 Mo. App. 518. An agreement by an agent of a carrier to have goods forwarded to their proper destination, from a point on a connecting line to which they were carried through the mistake of the shipper in addressing them, makes such carrier merely a gratuitous bailee of the goods. *Trevelen v. Northern Pac. R. Co.*, 89 Wis. 598, 62 N. W. 536. A common carrier is not liable, as a trespasser, to the owner of merchandise which it has refused to receive, as being badly packed, and which is destroyed, without negligence on its part, while being separated by it from other freight with which it has

of *Coggs v. Bernard*,<sup>104</sup> and all subsequent text-books on the subject agree with it. But what constitutes gross negligence is a question of no little difficulty. It cannot be answered by any rule which will furnish a reliable test in all cases. It must be determined as a question of fact in each particular case by the jury, under proper instructions from the court.<sup>105</sup> The care due from the bailee depends upon circumstances, such as the nature and quality of the goods bailed, and the character and customs of the place where

been improperly mixed, and which it is such carrier's duty to transport. *Gulf, C. & S. F. Ry. Co. v. Insurance Co. of North America* (Tex. Civ. App.) 28 S. W. 237. Where the defendant was to carry gold dust from California to Iowa gratuitously, there dispose of it, and turn the proceeds over to plaintiff's wife, he was held liable only for gross negligence. *Jourdan v. Reed*, 1 Iowa, 135. Where a person was to take abroad bonds gratuitously, and deposit them for sale for another person, he was held liable only for gross negligence. *Carrington v. Ficklin*, 32 Grat. (Va.) 670. But a deposit made at instance of bailee requires observance of ordinary care, at least. *Green v. Hollingsworth*, 5 Dana (Ky.) 173. Kent says there are several cases in which a naked depositary is answerable, besides the case of gross neglect: (1) When he makes a special acceptance to keep the goods safely. (2) When he spontaneously and officiously proposes to keep the goods of another. (3) When he is to receive a compensation for the deposit. 2 Kent, Comm. 565. On a deposit or bailment of money, to be kept without recompense, if the bailees, without authority, attempt to transmit the money to the bailor, at a distant point, by mail or private conveyance, and the money is lost, they are responsible. *Stewart v. Frazier*, 5 Ala. 114. If the bailee delegates his trust without the consent of the bailor, he is liable regardless of the question of negligence. *Colyar v. Taylor*, 1 Cold. (Tenn.) 372. A bank undertaking gratuitously to collect drafts through its correspondents is liable for their default. *Streissguth v. National German-American Bank*, 43 Minn. 50, 44 N. W. 797; *Power v. First Nat. Bank*, 6 Mont. 251. 12 Pac. 597; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199. By some authorities it is thought that where the bailee voluntarily offers to keep the goods of another he is liable for ordinary negligence, on the ground that, the request coming from him, the bailment is founded on a consideration, the act of the bailor in acceding to the request being a sufficient consideration; but the point has not been directly decided. See *Lawson, Bailm.* § 34; *Edwards, Bailm.* §§ 35, 39, 135; *Jones, Bailm.* § 48.

<sup>104</sup> 2 *Ld. Raym.* 909.

<sup>105</sup> *Lancaster Co. Nat. Bank v. Smith*, 62 Pa. St. 47; *Griffith v. Zipperwick*, 28 Ohio St. 388; *Doorman v. Jenkins*, 2 Adol. & E. 256; *Carrington v. Ficklin*, 32 Grat. (Va.) 670; *Third Nat. Bank v. Boyd*, 44 Md. 47.

they are to be kept.<sup>106</sup> There is a degree of care, however, indefinitely varied by the nature of the bailment and the circumstances of the case, which a bailor has a right to expect from a gratuitous bailee. This degree of care is called "slight diligence," and the want of it is designated as "gross negligence," and will render the bailee liable for resulting losses. Judge Story's definition<sup>107</sup> of slight diligence as that degree of care or diligence which men habitually careless or of little prudence generally take in their own concerns is perhaps as good as can be given.<sup>108</sup> Gross negligence may exist irrespective of any actual fraud or intentional bad faith. It is a breach of the contract or obligation which the law implies from the bailment in the absence of an express contract on the subject.<sup>109</sup>

<sup>106</sup> *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Eddy v. Livingston*, 35 Mo. 487.

<sup>107</sup> *Bailm.* § 16.

<sup>108</sup> In *Tompkins v. Saltmarsh*, 14 Serg. & R. 275, gross negligence was defined as the omission of that degree of care which even the most inattentive and thoughtless men take of their own concerns. Ordinary negligence was defined as the want of that diligence which the generality of mankind use in their own concerns. These definitions were approved in *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106, 117. The amount of care which gratuitous bailees, under the same circumstances, are accustomed to take of similar goods is a good test. *Brown, Carriers*, § 28; *Tracy v. Wood*, 3 Mason, 132, Fed. Cas. No. 14,130; *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810; *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162; *Bland v. Womack*, 2 Murph. 373; *Anderson v. Foresman*, *Wright* (Ohio) 598.

<sup>109</sup> *H.* offered to invest a sum of money for *D.* in the purchase of an annuity. He laid out the money in securities wholly insufficient, and of no value whatever. Held, that it does not necessarily follow from these circumstances that *H.* was guilty of gross or corrupt negligence. *Dartnell v. Howard*, 4 Barn. & C. 345. If a depositary fails to procure suitable means for the extinguishment of fires, he cannot be held liable for an accidental fire which destroyed the chattel deposited. *Clark v. Eastern R. Co.*, 139 Mass. 423, 1 N. E. 128. If the deposit is taken away by superior force, the depositary may make this a defense. *Watkins v. Roberts*, 28 Ind. 167. If a person intrusted with money by his superior to give to a third person gives it to a boy whom he has seen but a few times, and who has but recently entered the employ of said third person, and the boy absconds, the mandatary is guilty of gross negligence, and is liable to his superior for damages. *Skelly v. Kahn*, 17 Ill. 169. Where the speculations in stocks and bonds, on margins, of a bank cashier, of which the president had knowledge, were such

It has been frequently said that the bailee is not liable for a loss where he takes the same care of the thing bailed as he does of his own property.<sup>110</sup> But, as has been justly said, the rule affords a presumption rather than a conclusive test. The bailee is bound, as are the parties to all contracts, to the exercise of good faith; and, if he keeps the goods intrusted to him with less care than he keeps his own of the same kind, this is a circumstance from which a jury might well infer a want of good faith; but the keeping of them as his own is, as has been said by Lord Holt, an argument for his honesty. The Roman or civil law required nothing more. Gross negligence was regarded as the same thing as fraud, and consequently was considered rebutted when it appeared that the bailee had taken the same care of the bailed goods that he did of his own.<sup>111</sup> But it has been justly held, both in this country and in England, that the mere fact that a depositary kept the deposit in the same place or with the same care that he kept his own property will not exempt him from liability for gross negligence.<sup>112</sup> In *Doorman v. Jen-*

that the president must have known of the cashier's dishonesty, the bank is liable for bonds deposited with it as a gratuitous bailee which the cashier converted to his own use. *Merchants' Nat. Bank v. Guilmartin*, 93 Ga. 503, 21 S. E. 55.

<sup>110</sup> *Anderson v. Foresman*, Wright (Ohio) 598. Where money is paid by a judgment debtor to the judge, and the latter places it in his desk with his own money and then notifies the judgment creditor that the money is ready for him, and the latter neglects for two days to call for it, during which time the money is stolen, it was held that the judge was not guilty of gross negligence, and hence was not liable. *Monteith v. Bissell*, Wright (Ohio) 411. But where a mandatary lost money belonging to a mandator, while he preserved his own money, he is liable for the loss. *Bland v. Womack*, 2 Murph. (N. C.) 373.

<sup>111</sup> Story, Bailm. § 65. It is a suspicious circumstance when a bailee claims to have lost the bailed chattels and to have saved his own when both were together. *Bland v. Womack*, 2 Murph. 273.

<sup>112</sup> *Giblin v. McMullen*, 21 Law T. (N. S.) 214; *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106; *Tracy v. Wood*, 3 Mason, 132, Fed. Cas. No. 14,130; *Doorman v. Jenkins*, 2 Adol. & E. 256. "If he keeps the goods as he keeps his own, though he keeps his own negligently, he is not answerable for them. He is only answerable for fraud, or that gross neglect which is evidence of fraud." *Knowles v. Railroad Co.*, 38 Me. 55, 59. See, also, *Just. Inst. lib. 3, tit. 15, § 3*; *Coggs v. Bernard*, 2 Ld. Raym. 909, 914; *Foster v. Essex Bank*, 17 Mass. 479, 500.

kins,<sup>113</sup> Chief Justice Denman told the jury that it did not follow, from the defendant having lost his own money at the same time as the plaintiff's, that he had taken such care as a reasonable man would ordinarily take of his own, and that the fact relied on was no answer to the action if the jury believed that the loss had occurred through gross negligence. That was a case in which a coffee-house keeper received a deposit of money, and placed it in his cash box, in his taproom, in which he kept his own cash, and both were stolen together. There was a verdict for the plaintiff, and the instruction was approved by the whole court. In another noted case, that of *Tracy v. Wood*,<sup>114</sup> it was proved that the defendant was intrusted with two bags of gold, one within the other, to be gratuitously carried by him from New York to Boston, and that he brought the gold on board the vessel on the evening before it was to sail for Boston, in a valise containing money of his own, and left the valise during the night in another cabin. In the morning, just before the vessel started, the defendant found that one of the bags was missing, and immediately went on deck to make known his loss, in the meantime leaving the remaining bag in his valise on the cabin table. On returning, this bag also was missing. It was furthermore proved that, on making inquiries as to whether his valise would be safe, he was told that, if valuable, it had better be intrusted to the care of the captain's clerk. The whole point in the case was as to the question of negligence, and it was stated by Judge Story that "the true way of considering cases of this nature is to consider whether the party has omitted that care which bailees without hire or mandataries of ordinary prudence usually take of property of this nature. If he has, then it constitutes a case of gross negligence. \* \* \* The present is a case of a mandatary of money. The defendant is a broker accustomed to the use and transportation of money, and it must be presumed he is a person of ordinary diligence. He kept his own money in the same valise, and took no better care of it than of the plaintiff's. Still, if the jury are of opinion that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually

<sup>113</sup> 2 Adol. & E. 256.

<sup>114</sup> 3 Mason, 132, Fed. Cas. No. 14,130.



take of such property under such circumstances, he has been guilty of gross negligence."

Another reason has been suggested why the care which one takes of his own is an unjust criterion in this class of cases. It is that a man may with respect to his own property encounter risks from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable in respect to property belonging to another, and which he holds in trust.<sup>115</sup> Though there is weighty authority against him, Judge Story is clearly of the better opinion when he says:<sup>116</sup> "Notwithstanding the weight of these authorities, they do not seem to me to express the general rule in its true meaning. The depositary is, as has been seen, bound to slight diligence only; and the measure of that diligence is that degree of diligence which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. The measure, abstractly considered, has no reference to the particular character of an individual, but it looks to the general conduct and character of a whole class of persons." These principles were adopted in a leading Pennsylvania case,<sup>117</sup> where it was said that the question of the bailee's responsibility must be finally settled by a resort to the settled principle which deduces the measure of his duty in each particular bailment, from a comparison of his conduct with the conduct, not of individuals, but of classes of men, and the following instruction was approved: "If the bailee takes the same care of the goods bailed that he does of his own, that ordinarily repels the presumption of gross negligence. The desire to preserve one's own property from loss from any cause is, as a rule, so universal that the mind rests with satisfaction on the evidence which shows the same care of the bailed property which the bailee took to save his own, unless it was shown that he was grossly negligent of both; and, when this is done, he is not excused, but held answerable."

<sup>115</sup> Schouler, Bailm. 46.

<sup>116</sup> Story, Bailm. § 64.

<sup>117</sup> First Nat. Bank of Carlisle v. Graham, 79 Pa. St. 106.



*Same—Special Agreement—Knowledge of Bailee's Character and Manner of Keeping Goods.*

The normal rule in bailments of the present class is that the bailee is liable only for gross negligence.<sup>118</sup> What constitutes gross negligence must be determined with reference inter alia to the bailment contract. Subject only to the limitation that their contract must not be in violation of law or against public policy,<sup>119</sup> the parties may vary their rights and liabilities at will.<sup>120</sup> They may stipulate for different degrees of diligence or regulate the manner of carrying out the bailment. If the bailor agree that his goods may be kept in a particular place or manner, he cannot afterwards object that it was negligent to keep them in such place or manner, for his assent amounts either to a qualification of the contract for safe custody, or to an agreement that for all the purposes of the deposit the place shall be deemed sufficiently safe.<sup>121</sup> So, also, it is held that where the bailor knows the general character and habits of the bailee, and the place where and the manner in which the goods deposited are to be kept by him, the bailor must be presumed to assent in advance that his goods shall be thus treated; and if, under such circumstances, they are damaged or lost, it is by reason of his own fault or folly. He should not have intrusted them with such a depositary, to be kept in such a manner and place.<sup>122</sup> These principles were applied in a case where the bailor had consented that his hay should be stored on a certain wharf of the bailee. The wharf was open to the inspection of the world, and the bailor had the same opportunity to observe its condition as

<sup>118</sup> A depositary must exercise the common diligence used by depositaries in general. He cannot exempt himself from the consequences of omitting such diligence, unless he deduce a more limited liability from all the circumstances of his own particular case. *Finucane v. Small*, 1 Esp. 315.

<sup>119</sup> See ante, p. 28.

<sup>120</sup> A carrier without hire is liable on his express promise to deliver safely. *Delaware Bank v. Smith*, Edm. Sel. Cas. (N. Y.) 351. A special acceptance to keep safely is an undertaking to keep safely with reference to the degree of care which, under the circumstances, the law required of the depositary. *Ross v. Hill*, 2 C. B. 877.

<sup>121</sup> *McKay v. Hamblin*, 40 Miss. 472.

<sup>122</sup> *Knowles v. Railroad Co.*, 38 Me. 55; *Conway Bank v. American Exp. Co.*, 8 Allen (Mass.) 512; *Arthur v. Railway Co.*, 38 Minn. 95, 35 N. W. 718.

the bailee. The wharf broke down from overloading. No additional incumbrance had been placed on the wharf after the arrival of the hay. It was held that the bailee was not liable.<sup>123</sup> Where knowledge of a general custom in regard to such bailment can be imputed to the bailor, he is presumed to have consented that his goods should be kept in accordance with such custom.<sup>124</sup>

*Same—Bailments by Operation of Law.*

In quasi bailments, where one comes into possession of goods lawfully, as by finding, he is liable for gross negligence just as are all other bailors without recompense.<sup>125</sup> There are some early dicta to the effect that such bailees are liable only for distinct wrongs amounting to a conversion, but they have not been approved.

In quasi bailments, where one comes into possession of goods through a wrong, as by conversion, he is strictly liable, irrespective of the question of negligence. By wrongfully taking possession of the goods, he becomes an insurer against loss.<sup>126</sup>

*Same—Bailments Demanding Skill.*

Where a bailment is of such a character that its acceptance necessarily involves an assumption of skill, failure to exercise such skill may constitute gross negligence.<sup>127</sup> In such cases the skill of the

<sup>123</sup> Knowles v. Railroad Co., 38 Me. 55.

<sup>124</sup> Cf. Conway Bank v. American Exp. Co., 8 Allen (Mass.) 512; Kelton v. Taylor, 11 Lea (Tenn.) 264.

<sup>125</sup> Dougherty v. Posegate, 3 Iowa, 88; Mosgrave v. Agden, Owen, 141; Drake v. Short, 4 Esp. 165. And see, as to an officer holding goods under an attachment, Parrott v. Dearborn, 104 Mass. 104; Blake v. Kimball, 106 Mass. 115; Whittier v. Smith, 11 Mass. 211; Jewett v. Torrey, Id. 219.

<sup>126</sup> For a full discussion of the reasons of this strict liability, see post, p. 189.

<sup>127</sup> One who, without any benefit to himself, rides a horse, at the owner's request, for the purpose of exhibiting him for sale, is bound to use such skill as he possesses, and, if proved to be skilled in horses, is equally liable with a borrower for an injury done to the horse. Wilson v. Brett, 11 Mees. & W. 113, 12 Law J. Exch. 264. Where the profession of the bailee implies skill, a want of skill is imputable as gross negligence. Stanton v. Bell, 2 Hawks (N. C.) 145; Gill v. Middleton, 105 Mass. 477; Eddy v. Livingston, 35 Mo. 487, 493; Shiells v. Blackburne, 1 H. Bl. 158. Where a farrier, without reward, offers to cure a horse of a swelling on the hock joint, and he makes the puncture so unskillfully that the horse becomes worthless, this act is equivalent to gross negligence. Conner v. Winton, 8 Ind. 315.

average member of the same profession or class is the standard of comparison.<sup>128</sup> Less than such average skill might still be slight skill, but a total absence of all skill would certainly be gross negligence. Lord Loughborough, in *Shiells v. Blackburne*,<sup>129</sup> says: "I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is liable only for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence." This case is cited in *Stanton v. Bell*,<sup>130</sup> where the holding is to the same effect.

*Same—Liability for Sealed Packages.*

A question may arise with respect to the liability of a bailee for the loss of articles contained in a package, the contents of which are unknown to him. Knowledge of the contents is important in determining whether the bailee exercised a proper degree of diligence. The question admits of a different determination according to circumstances. If the bailee knew that the box or casket contained jewels, although the bailor took away the key, he would be bound to a degree of diligence proportioned to the value of the contents. In other words, the same degree of care which would ordinarily be required to be taken of such valuables when deposited would be exacted of him. If he had no ground to suppose that the box or casket contained any valuables whatsoever, he would be bound only to such reasonable care as would be required of depositaries in cases of articles of common value;<sup>131</sup> but, if guilty of gross negligence under such circumstances,—that is, if liable at all,—he would be liable for the full value of the contents, for, the loss being a direct one, actual anticipation of its extent is immaterial.<sup>132</sup> If, on the other hand, there was a meditated concealment of the

<sup>128</sup> *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106; *Shiells v. Blackburne*, 1 H. Bl. 158.

<sup>129</sup> 1 H. Bl. 158.

<sup>130</sup> 2 Hawks (N. C.) 145. See, also, *Conner v. Winton*, 8 Ind. 315.

<sup>131</sup> Story, Bailm. § 77.

<sup>132</sup> *Little v. Railway Co.*, 66 Me. 239; *Mather v. American Exp. Co.*, 138 Mass. 55. And see *France v. Gaudet*, L. R. 6 Q. B. 199; *Wilson v. Railway Co.*, 9 C. B. (N. S.) 632.

contents of the box or casket from the bailee, with a view to induce him to receive the bailment, and he would not have received it or have exposed it as he did if he had been made acquainted with the facts, then the transaction would be deemed a fraud upon him, or, at least, the loss would be deemed one occasioned by the bailor's own folly or laches; and the bailee would not, even in a case of gross negligence, be responsible beyond the value of the box or casket itself, without the contents, and perhaps not even for that.<sup>133</sup>

*Same—Illustrative Cases.*

In one of the earliest English cases reported,<sup>134</sup> a man who undertook to keep 100 sheep was held liable when they were drowned, on the ground that a trust voluntarily undertaken was good ground for the action. The preceding case was cited in *Coggs v. Bernard*.<sup>135</sup> The declaration in the latter case was that the defendant had undertaken safely and securely to take up, and safely and securely to deposit, certain hogsheads of brandy, from one cellar to another, and that this was done so negligently and carelessly that by the defendant's want of care, or that of his agents or servants, a hogshead was staved, and a quantity of brandy was spilt. After a verdict for the plaintiff, a motion in arrest of judgment was made on the ground that it was not alleged that the defendant was a common porter, nor that he had received any consideration for his pains. Lord Holt held the defendant liable by reason of his neglect in the performance of his agreement, but also held that, had the accident happened by the act of a third party without fault in the defendant, the latter would not have been liable. The fact that the owner of the brandy had trusted the defendant with it was held to be sufficient to impose the duty of careful management upon the bailee, where the latter had actually entered upon the discharge of the agreed duty, though he need not have so undertaken. (Here the case is cited of a carpenter who undertook to build a house within a certain time, and failed to do so, in which it was held that

<sup>133</sup> *Batson v. Donovan*, 4 Barn. & Ald. 21; *Sleat v. Fagg*, 5 Barn. & Ald. 342; *Bradley v. Waterhouse*, 1 Moody & M. 154; *Gibbon v. Paynton*, 4 Burrows, 2298; *Warner v. West. Transp. Co.*, 5 Rob. (N. Y.) 490; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85. And see *Civ. Code Cal.* § 1840.

<sup>134</sup> 1 Rolle, Abr. 10; 2 Hen. VII. 11.

<sup>135</sup> 2 Ld. Raym. 909.

an action would not lie, though, had the question been one of unskillfulness, an action might have been maintained.)<sup>186</sup> And so a bare being trusted with another's goods must be taken to be a sufficient consideration if the bailee once enter upon the trust, and take the goods into his possession.\*

As an instance in which a gratuitous bailee was exonerated from responsibility for the loss of the thing bailed to him, the case of *Spooner v. Mattoon*<sup>187</sup> may be noticed. In this case it appeared that the plaintiff, a soldier, had been accustomed to leave his pocket-book each night with a friend tenting near him, and to receive it again the next day. Upon one occasion he failed to call as usual, and the bailee, not being able to wait, started to deliver it to him. Not being able to get the book in his pocket, the bailee placed it under his vest, holding his hand upon it on the outside of the vest. While thus carrying it, the pocketbook was lost. In the action against him by the bailor, the defendant was held not liable, on the ground that he had acted with that measure of diligence demanded from a gratuitous bailee.

*Same—Case Illustrating Effect of Local Custom.*

As showing the effect of local custom upon the care demanded from the bailee, the case of *Eddy v. Livingston*<sup>188</sup> is in point. Here it was shown that money had been deposited with a gratuitous bailee in Utah to be sent to a party in St. Louis. There being no bankers in the bailee's place of residence, it was the custom in remitting money for several persons together to buy drafts of United States officers upon the department. The bailee took the money held by him, with money of his own, and of other persons, and bought the draft of a United States marshal upon the treasury department, which draft was refused. The bailee, having in good faith made use of the usual method of transmitting money, was held not liable to the bailee for the loss of the money of the latter.

<sup>186</sup> 11 Hen. IV. c. 33.

\* For other illustrations of what constitutes gross negligence, see *Joslyn v. King*, 27 Neb. 38, 42 N. W. 756; *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810; *Pfether v. Kean*, 29 Fed. 498.

<sup>187</sup> 40 Vt. 300.

<sup>188</sup> 35 Mo. 487.



*Same—Case Illustrating Effect of a Second Bailment.*

In *Fulton v. Alexander*,<sup>139</sup> the defendant, as bailee, received a package of money to be gratuitously delivered by him in New Orleans, whither he was going. Owing to an epidemic prevalent in that city upon his arrival, the bailee did not consider it safe to remain, but deposited the money, together with some of his own, with a firm of good standing, with whom he was in the habit of doing business, to be by them delivered to H., for whom it was intended. Several attempts were made by the firm to deliver the money to H., without success, and he was finally notified that the money was deposited for him. He failed to call for it until the firm had failed, and he was then unable to obtain it. In an action against the first bailee, it was held that, since the trust was gratuitous, the bailee was liable only for good faith and ordinary diligence, and that, under the circumstances, gross negligence could not be imputed to him.

*Same—Illustrative Cases of Special Bank Deposits.*

In regard to the liability of banks for special deposits gratuitously received by them, the leading case is *Foster v. Essex Bank*.<sup>140</sup> In this case the testator of the plaintiff had left with the bank for safe-keeping a quantity of gold, and had received from it a memorandum signed by the president and cashier. This gold was fraudulently taken by the cashier, but the bank was held not liable to the plaintiff for the value of the gold. The act of the cashier was considered to be that of a thief, and, as such, his employers could not be held responsible for his actions outside of his proper authority.<sup>141</sup> The bank was acquitted of all negligence in employing the cashier or in inspecting his accounts.

<sup>139</sup> 21 Tex. 148. See, also, *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452.

<sup>140</sup> 17 Mass. 479.

<sup>141</sup> In this class of cases is very often involved the question of the responsibility of a corporation for the acts of its servants or agents, and it is usually held that where an agent is acting in the usual transaction of his employer's business, no personal responsibility attaches to such agent; but when he acts in a way beyond the scope of the duty for which he was employed, and does so without his employer's sanction, he alone will be liable. Upon this point see *Story, Ag.* §§ 74, 75, 239; *Smith, Mast. & S.* 123, 126. These cases are not free from doubt. The cashier was acting in the course of his employ-



In the case of *Scott v. National Bank of Chester Valley*,<sup>142</sup> the teller absconded with bonds which had been deposited in the bank. It was held that the bank was not liable, since there was no proof of gross negligence on the part of the corporation. In his opinion, Agnew, C. J., said: "There was no undertaking to the bailor that the officers should not steal. \* \* \* The case does not rest on a warranty or undertaking, but on gross negligence in care-taking. Nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care, higher than a gratuitous bailment can create."

*End Huns Jan 9th*

TERMINATION OF BAILMENT.

15. Bailments for the sole benefit of the bailor may be terminated—

(a) By full performance (p. 73).

(b) By mutual consent (p. 73).

(c) At option of either party, except—

**EXCEPTION**—Where something precise was to be accomplished, the bailee, having entered upon performance, must complete it (p. 74).

(d) By bailee's wrong (p. 75).

(e) By death of either party (p. 76).

(f) By bankruptcy (p. 77).

(g) By change of state of parties (p. 77).

*Termination by Full Performance.*

As a matter of course, upon the accomplishment of the purpose for which the bailment was constituted, the bailment comes to a natural end. All that remains to be done is to redeliver or deliver over the goods in accordance with the bailment contract.

*Termination by Mutual Consent.*

Bailments may also be terminated at any time by the mutual assent of the parties thereto. In this respect the bailment contract

ment, if not in the scope of it. See 1 *Jag. Torts*, p. 251; *Schouler, Dom. Rel.* § 489. See, also, ante, p. 48, note 52.

<sup>142</sup> 72 Pa. St. 471.

is like all other contracts. They are always under control of the parties who made them. The parties cannot tie their own hands. The power that created may likewise destroy.<sup>143</sup> So a gratuitous bailment may be changed into one for mutual benefit, or an entirely different arrangement may be substituted for the bailment relation; as where, after making a special deposit of money, the parties agree that the depositary shall pay the depositor interest thereon. This has been held to change the bailment relation into one of debtor and creditor.<sup>144</sup>

*Termination at Option of Either Party.*

Bailments of every class may be terminated by full performance or by mutual assent. But bailments for the sole benefit of the bailor may, with few exceptions, be also terminated by either party alone at his option. Thus, if a deposit is made to be restored at a future time, it may be immediately demanded back by the depositor; for, as the depositary has no interest in the custody, he can have no right to retain the thing against the will of the depositor. If the bailee was to derive a benefit from the custody, the bailment would not belong to this class.<sup>145</sup> So, also, in the case of mandates, where the thing is to be delivered to a third person, if the latter has no vested interest in it, the bailor may revoke the bailment at any time.<sup>146</sup> On this principle, it was said in a New Hampshire case that a party who deposits money with another, to be appropriated for the benefit of a third person, being under no legal obligation to so appropriate it, has a right to countermand the appropriation, and recall the money at any time before it has been actually appropriated, or before such an arrangement has been entered into between the depositary and the person for whose benefit it was deposited as creates a privity between them and amounts to an ap-

<sup>143</sup> Clark, Cont. 608.

<sup>144</sup> Howard v. Raeber, 33 Cal. 399; Hathway v. Brady, 26 Cal. 581; Chiles v. Garrison, 32 Mo. 475; Rankin v. Craft, 1 Heisk. (Tenn.) 711; Cicalla v. Rossi, 10 Heisk. (Tenn.) 67.

<sup>145</sup> Graves v. Ticknor, 6 N. H. 537; Beardslee v. Richardson, 11 Wend. (N. Y.) 25.

<sup>146</sup> Copeland v. Insurance Co., 6 Pick. (Mass.) 198; Salt v. Field, 5 Term R. 211. The revocation need not be express, but may be implied. Copeland v. Insurance Co., supra.

propriation of it. Anything short of this is immaterial and unimportant, so far as concerns the depositor's right to recall and recover back his money.<sup>147</sup> Where the bailor wishes to terminate the bailment, he should make a demand, as a demand and a refusal are ordinarily evidence of conversion. If the bailee improperly refuses to redeliver the goods when demanded, he henceforth holds them at his own peril. If, therefore, they are afterwards lost, either by negligence or inevitable accident, he is liable. The demand fixes liability.<sup>148</sup> However, when the circumstances show that a demand would be wholly futile, none need be made.<sup>149</sup> A demand and a refusal are not the only evidence of a conversion.

A bailee without hire is ordinarily not bound to keep articles deposited with him. He may terminate the bailment by giving the bailor notice to remove the goods, and allowing him a reasonable time in which to do so. If, upon tender of the goods, the owner refuses to take them away, the bailee may place them off from his premises.<sup>150</sup> This right of the bailee, however, is subject to an exception. When something definite was to be accomplished, as where goods were to be kept for a fixed time or certain services were to be performed about them, the bailee cannot terminate the bailment before full performance, after he has once entered upon its execution. In such cases a termination of the bailment without consent of the bailor would constitute a breach of contract, for which he would be liable in damages.<sup>151</sup>

#### *Termination by Bailee's Wrong.*

A conversion by the bailee of the property intrusted to him will justify the bailor in treating the bailment as at an end, though the

<sup>147</sup> Winkley v. Foye, 33 N. H. 171.

<sup>148</sup> Emerick v. Chesrown, 90 Ind. 47; Zuck v. Culp, 59 Cal. 142; Stewart v. Frazier, 5 Ala. 114; Hosmer v. Clarke, 2 Greenl. (Me.) 308; Montgomery v. Evans, 8 Ga. 178; McLain v. Huffman, 30 Ark. 428; Jackman v. Partridge, 21 Vt. 558; Brown v. Cook, 9 Johns. (N. Y.) 361; Magee v. Scott, 9 Cush. (Mass.) 148.

<sup>149</sup> First Nat. Bank v. Dunbar, 118 Ill. 625, 9 N. E. 186; Kellogg v. Olson, 84 Minn. 103, 24 N. W. 364; Huntsman v. Fish, 36 Minn. 148, 30 N. W. 455; Derrick v. Baker, 9 Port. (Ala.) 362.

<sup>150</sup> Raulston v. McClelland, 2 E. D. Smith (N. Y.) 60.

<sup>151</sup> Story, Bailm. § 202. And see ante, p. 54, "Nonfeasance."

wrongful act will not of itself terminate the bailment to his prejudice.<sup>152</sup> Thus, where a bailee wrongfully disposes of the property to a third person, the statute of limitations does not run against an action on the bailment contract until the breach is discovered.<sup>153</sup> In case of such a conversion, the bailor may, however, treat the bailment as terminated, and recover the property itself from whomsoever is in possession.<sup>154</sup>

*Termination by Death.*

The bailment relation is in many respects one of principal and agent. This is especially apparent in considering the effect of death upon the relation. The death of the bailor or principal at once operates as a revocation of authority. The rule is equally true both in cases of deposits and mandates. In either case, upon the death of the bailor, his representatives have an immediate right to possession. In the meanwhile a quasi bailment relation, in the nature of a deposit, exists between the bailee and the bailor's representatives. Whether a mandatary who goes on and performs the mandate after the bailor's death, but in ignorance of it, would be held to a strict accountability, as in the case of a wrongdoer, has not been decided; but Mr. Schouler<sup>155</sup> apprehends that "he would not be strictly dealt with, for our modern inclination is to that civil policy which upheld all the acts performed in good faith by an agent after his principal's death, while as yet not aware of the fact."<sup>156</sup>

It is not clear by the authorities whether the death of the bailee actually terminates the relation or merely gives the bailor the right to at once terminate it and reclaim his property,—a right which he already had, irrespective of the bailee's death. The true rule seems to be that, upon the death of the bailee, if the contract of bailment was such as would survive and be binding upon one's rep-

<sup>152</sup> King v. Bates, 57 N. H. 446; Crump v. Mitchell, 34 Miss. 449; McMahon v. Sloan, 12 Pa. St. 229; Wilkinson v. Verity, L. R. 6 C. P. 206.

<sup>153</sup> Wilkinson v. Verity, L. R. 6 C. P. 206; Crump v. Mitchell, 34 Miss. 449; McMahon v. Sloan, 12 Pa. St. 229.

<sup>154</sup> King v. Bates, 57 N. H. 446.

<sup>155</sup> Bailm. § 61.

<sup>156</sup> Cf. Hunt v. Rousmaniere, 8 Wheat. 174; King v. Bedford Level, 6 East, 356; Wallace v. Cook, 5 Esp. 118; Cassiday v. McKensie, 4 Watts & S. 282; Carriger v. Whittington, 26 Mo. 313.

representatives, as in the case of ordinary contracts,—that is, when it was not founded on considerations of personal confidence, and does not require peculiar skill in its performance,—the bailee's representatives are bound to go on and perform it, unless countermanded by the bailor. If the bailor countermands his authority, or if the bailment contract involves considerations of personal confidence and skill, the death of the bailee discharges the contract, and his representatives need not execute it. They hold the property as quasi bailees in the nature of depositaries. If there are joint mandataries, the death of one of them dissolves the contract as to all, for, by the general rule of the common law, an authority to two cannot be executed except by both.<sup>157</sup> As to whether this rule would apply in cases of bailments not requiring the united advice, confidence, and skill of all, Judge Story<sup>158</sup> seems doubtful. Where the authority of the bailees is joint and several, the death of one does not revoke the authority of the others to act.

*Termination by Bankruptcy.*

Bankruptcy of the bailor terminates any authority to a mandatary,<sup>159</sup> and the bailor's right to the bailed property passes to his assignee.<sup>160</sup> The bankruptcy of the bailee probably terminates the bailment also.<sup>161</sup>

*Termination by Change of State of Parties.*

The contract of mandate may be dissolved by a change of the state of the parties; as, if either party, being a female, marries before the execution of the mandate,<sup>162</sup> or if either party becomes insane or non compos mentis or is put under guardianship, the mandate is revoked.<sup>163</sup> Pothier puts the case of the marriage of the mandator only;<sup>164</sup> but the same rule would seem, ordinarily, to apply to the marriage of the mandatary, since her husband's rights may be af-

<sup>157</sup> *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543.

<sup>158</sup> Bailm. § 202.

<sup>159</sup> *Parker v. Smith*, 16 East, 382; *Minett v. Forrester*, 4 Taunt. 541.

<sup>160</sup> *Ex parte Newhall*, 2 Story, 360, Fed. Cas. No. 10,159.

<sup>161</sup> Story, Bailm. § 211.

<sup>162</sup> See Story, Ag. §§ 488-500; Story, Bailm. § 206.

<sup>163</sup> Story, Ag. § 481.

<sup>164</sup> Poth. *Contrat de Mandat*, note 111.



fectured by her conduct.<sup>165</sup> The common law deems the marriage of a woman to be a revocation of the antecedent authorities conferred by her on other persons, for her acts may be to the prejudice of the husband's rights.<sup>166</sup>

So, also, where the bailor was acting in a representative capacity, as executor, administrator, or guardian, upon his death or removal or the expiration of his trust, his authority to the bailee is revoked by operation of law.<sup>167</sup>

### SAME—REDELIVERY.

16. At the termination of the bailment, the bailee must redeliver or deliver over the property bailed. This delivery marks the complete termination of the bailment, and, until it is made, a bailment relation continues to exist.

17. The bailee's duty to deliver up the property at the termination of the bailment may be considered with reference to—

(a) The property to be delivered (p. 78).

(b) The person to whom delivery should be made (p. 79).

(c) The place where delivery should be made (p. 80).

#### *The Property to be Delivered.*

As has been seen, a bailee is bound to deliver up the goods at the termination of the bailment, and, until such delivery is made, he remains subject to the liabilities of a bailee. The identical property is to be delivered in the condition in which it is at the termination of the bailment, together with all increase and profit derived from it.<sup>168</sup> If the property is injured or even lost or destroyed entirely,

<sup>165</sup> See Story, Ag. § 481; 2 Kent, Comm. (4th. Ed.) lect. 41, p. 645.

<sup>166</sup> 2 Rep. Husb. & Wife, 69, 73; 2 Kent, Comm. (4th. Ed.) lect. 41, p. 645; Story, Ag. § 481.

<sup>167</sup> Story, Bailm. § 207.

<sup>168</sup> If an animal deposited brings forth young, the latter must also be restored to the owner. He must deliver it in the state in which he received it, with the profits and the increase, and if he falls in either of these respects he is liable. *Game v. Harvie*, Yel. 50; Code La. art. 2919.



when the time comes to deliver it up, the bailee is responsible only when such loss or injury is due to his gross negligence or bad faith. If the goods are taken from the bailee by regular and valid proceedings at law, it is a good defense to an action by the bailor for their nondelivery.<sup>169</sup>

*To Whom Delivery should be Made.*

At the termination of the bailment, the property should ordinarily be redelivered or delivered over, in accordance with the terms of bailment.<sup>170</sup> When the bailee redelivers to his bailor without notice of any adverse claim, he will be protected from liability; but,

<sup>169</sup> See *Bliven v. Railway Co.*, 36 N. Y. 403; *Burton v. Wilkinson*, 18 Vt. 186. A depositary may set up a seizure of the goods under an attachment against third persons. *Stiles v. Davis*, 1 Black (U. S.) 101. But see *Wareham Bank v. Burt*, 5 Allen (Mass.) 113. He can also set up that the goods were forcibly taken from him without his fault. *Watkins v. Roberts*, 28 Ind. 167. If the property is legally taken from the depositary by process of law, or if the deposit is recovered by paramount title by third party, the former is absolved from responsibility. *Edson v. Weston*, 7 Cow. (N. Y.) 278; *Shelbury v. Scotsford*, Yel. 23; *Biddle v. Bond*, 34 Law J. Q. B. 137; *Wilson v. Anderton*, 1 Barn. & Adol. 450; *The Idaho*, 93 U. S. 575. If a coroner find property on the person of one deceased which belongs to another, it is the coroner's duty to deliver it to the true owner. He cannot set up title in the administrator. *Smiley v. Allen*, 13 Allen (Mass.) 465. A bailee cannot set up title in himself to justify his refusal to return. *Simpson v. Wrenn*, 50 Ill. 222; *Nudd v. Montayne*, 38 Wis. 511. When the depositor becomes a bankrupt. See *Lain v. Gaither*, 72 N. C. 234. Where an owner gives a receipt for property to an officer who has seized it under process, he cannot set up title in himself until he has restored it to the officer. *Brusley v. Hamilton*, 15 Pick. (Mass.) 40. If a depositary gives a receipt to a third party, acknowledging that he received the property from him, it is equivalent to a conversion. *Halbrook v. Wight*, 24 Wend. (N. Y.) 169. If a depositary receives money from a depositor in fraud of the latter's creditors, he cannot set up that fact in defense of an action by the depositor or his assignee, when the creditors have taken no steps to avoid the transaction. *Brown v. Thayer*, 12 Gray (Mass.) 1; *Hendricks v. Mount*, 5 N. J. Law, 850. The depositaries of a fund are not liable for paying a draft drawn on them by its apparent owner before they had any knowledge of the fact that a third person had an interest in such fund. *Morrison v. Ashburn* (Tex. Civ. App.) 21 S. W. 993.

<sup>170</sup> *Burton v. Baughan*, 6 Car. & P. 674; *Smiley v. Allen*, 13 Allen, 465; *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369.

if he delivers the property to his bailor in disregard of a third person's claim of title, he does so at his peril. The rights and liabilities of a gratuitous bailee under such circumstances are not different from those of any other bailee under similar circumstances, and have already been sufficiently considered.<sup>171</sup>

*Place Where Delivery shall be Made.*

If the bailment contract provides where the property bailed shall be redelivered, that, of course, governs. If it does not, much will depend upon the particular circumstances of the case and the presumed intention of the parties. It is difficult to lay down any general rule. On the theory that a bailee without reward ought to be given as little trouble as possible, the place of deposit will be considered the place for delivery, unless some other is agreed upon or may be implied from the nature of the transaction.<sup>172</sup> In the case of a mandate to transport goods, the place of surrender would almost necessarily be provided for. In the case of a mandate to perform work and labor about the goods, the place where they are kept by the bailee would probably be the place for surrender, unless some other place was so obviously more convenient that the parties may be presumed to have intended a delivery at the latter place.

<sup>171</sup> Ante, p. 30. A mere depositary is not liable to an action, until refusal to deliver up on demand. *West v. Murph*, 3 Hill (S. C.) 284; *Hill v. Wiggin*, 31 N. H. (11 Fost.) 292; *Brown v. Cook*, 9 Johns. (N. Y.) 361; *Phelps v. Bostwick*, 22 Barb. (N. Y.) 314; *Duncan v. Magette*, 25 Tex. 245; *Jackman v. Partridge*, 21 Vt. 558. A. deposited money with B., to be paid to C. when A. should have satisfied himself of a fact connected with the deposit. Held, that no duty rested upon B. to inquire whether the fact had occurred; and in a suit by C. against B. to recover the money, evidence was inadmissible to show that A. had declared himself satisfied of the fact, unless such declaration had been made known to B. before the suit. *Carle v. Bearce*, 33 Me. 337. Where one as a bailee without hire receives money to deliver to another, there is an implied contract that he shall deliver it, or return it, or account for it in a reasonable time. *Graves v. Ticknor*, 6 N. H. 537.

<sup>172</sup> *Scott v. Crane*, 1 Conn. 255; *Slingerland v. Morse*, 8 Johns. 370; *Mason v. Briggs*, 16 Mass. 453. A demand for the return may be made elsewhere. *Dunlap v. Hunting*, 2 Denio, 643; *Scott v. Crane*, 1 Conn. 255.

## CHAPTER III.

## BAILMENTS FOR THE BAILEE'S SOLE BENEFIT.

- 18-19. Commodatum.
- 20. Establishment of Relation.
- 21. Rights and Liabilities of Parties.
  - (a) Ordinary and Extraordinary Expenses.
  - (b) Liability of Lender for Defects.
  - (c) Fraud in Procuring Loan.
  - (d) Right to Use.
  - (e) Right of Action against Third Persons.
  - (f) Liability for Negligence.
- 22. Termination of Loan.
- 23. Redelivery.

## COMMODATUM.

- 18. Bailments for the sole benefit of the bailee correspond to the Roman commodatum.
- 19. A commodatum is a bailment for the temporary beneficial use by the bailee, gratis, of a chattel, which the bailee must afterwards return. In short, it is a loan for use.

In the modern classification of bailments, bailments for the sole benefit of the bailee correspond exactly with the Roman commodatum. In this class of bailments the sole benefit is received by the bailee, consisting in the use of the article bailed, and the bailor is wholly without reward.<sup>1</sup> In substance, the Roman commodatum is

<sup>1</sup>According to Sir William Jones (Bailm. 118), "lending for use is a bailment of a thing for a certain time, to be used by the borrower without paying for it." The civil-law definition is that it is the grant of a thing to be used by the grantee gratuitously for a limited time, and then to be specifically returned. Story, Bailm. § 219. In the words of Chancellor Kent (2 Comm., 13th Ed., 573), it is "a bailment or loan of an article for a certain time, to be used by the borrower without paying for the use." According to Ayliffe (Pand. bk. 4, tit. 16, p. 516), "it is a grant of something made in a gratuitous manner for some certain use, and for a certain term of time, expressed or implied, to the end that the same

simply the loan of a chattel to be used by the bailee temporarily for his own benefit, and then returned to the bailor. In Roman jurisprudence there were two kinds of bailments for the sole benefit of the bailee,—the *commodatum* and the *mutuum*; the distinguishing feature between them being that, in the case of a *commodatum*, the identical thing loaned was to be returned, while in the case of a *mutuum* the loan might be repaid in other articles of the same kind. The loan of articles whose use consisted in their consumption would necessarily be a *mutuum* or a gift. It has been seen that at common law the *mutuum* is not considered a bailment at all.<sup>2</sup> A loan of articles to be consumed in the use, if for the sole benefit of the bailee, could not well be other than a gift.<sup>3</sup>

The English terms "loan" or "lending" are not an accurate trans-

species should be again returned or restored again to us, and not another species of the same kind or nature; and this in as good a plight as when delivered to us." In *Coggs v. Bernard*, 2 Ld. Raym. 909, 913, Lord Holt says that a *commodatum* arises "when goods or chattels that are useful are lent to a friend, gratis, to be used by him."

Of the modern authors, the definition of Schouler is worthy of attention. In this he says: "We may define the bailment as one for the temporary beneficial use, gratis, of a chattel which the borrower must return." A loan of property on condition that it shall be turned into a sale if certain payments are made does not subject the property in hands of the bailee to levy for the debts of the bailee. *Clark v. Jack*, 7 Watts (Pa.) 375. Where a slave is placed by his owner in the possession of a third person, "to take care of him, keep him until called for, and pay nothing for his hire during the time he might have him," this is a mere deposit, and does not amount to a contract of hiring. *Farrow v. Bragg*, 30 Ala. 261. For transactions held to be loans, and not gifts or sales, see *Smith v. Jones*, 8 Ark. 109; *Boswell v. Clarksons*, 1 J. J. Marsh. (Ky.) 47. And see *Morris v. Caldwell*, 3 J. J. Marsh. (Ky.) 693; *Breeding v. Thriekeld*, 6 J. J. Marsh. (Ky.) 378; *Hinson v. Hinson*, 10 La. Ann. 580; *Williams v. McGrade*, 13 Minn. 174 (Gil. 165); *Collier v. Poe*, 1 Dev. Eq. (N. C.) 55; *Hurd v. West*, 7 Cow. (N. Y.) 752; *Otis v. Wood*, 3 Wend. (N. Y.) 498.

See, also, *Francis v. Shrader*, 67 Ill. 272; *Chamberlin v. Cobb*, 32 Iowa, 161; *Carpenter v. Branch*, 13 Vt. 161.

<sup>2</sup> Ante, p. 8. And see *Hurd v. West*, 7 Cow. (N. Y.) 752; *Ives v. Hartley*, 51 Ill. 520; *Lonergan v. Stewart*, 55 Ill. 44; *Chase v. Washburn*, 1 Ohio St. 244; *Inglebright v. Hammond*, 19 Ohio, 337; *Carpenter v. Griffin*, 9 Paige, Ch. (N. Y.) 310; *Chiles v. Garrison*, 32 Mo. 475.

<sup>3</sup> But see *Archer v. Walker*, 38 Ind. 472.

lation of the Roman "commodatum," for, in popular speech, "loan" is broad enough to include commodatum and mutuum. A transaction is often spoken of as a loan although repayment is to be made in other articles of like kind, as in the case of loan of money, and the lender is to receive compensation. The term "loan," therefore, when used to designate a bailment of this class, must be understood to mean a gratuitous loan, which contemplates the specific return of the thing loaned.

### ESTABLISHMENT OF RELATION.

20. In addition to the general requisites of every bailment, it is essential to the creation of a bailment for the bailee's sole benefit—

- (a) That it be created by contract (p. 83).
- (b) That it be without intended compensation to the bailor (p. 84).
- (c) That it be for the exclusive use of the bailee (p. 85).

#### *Must be Created by Contract.*

It follows from the definition of "commodatum" or "loan" that it cannot be created except by contract. Only by the owner's consent can one acquire the right to use gratuitously for his own benefit another's property. Both parties, therefore, must be competent and free to contract. Fraud or force will vitiate the contract, and may render the pretended borrower criminally liable as well.<sup>4</sup>

As to the persons between whom a gratuitous loan may be contracted, in general, the contract may arise between any persons who have a legal capacity to contract.<sup>5</sup> But in respect to idiots, lunatics, and married women, at common law, it cannot arise, unless, in the latter case, it is with the consent of her husband, in which event it binds him, but not her.<sup>6</sup> In respect to a minor the contract is not absolutely void, but it is voidable at his election.<sup>7</sup> The contract

<sup>4</sup> State v. Bryant, 74 N. C. 124; Clark, Cr. Law, 250.

<sup>5</sup> Campbell v. Stakes, 2 Wend. (N. Y.) 137.

<sup>6</sup> Hagebush v. Ragland, 78 Ill. 40.

<sup>7</sup> See Vasse v. Smith, 6 Cranch, 226; Campbell v. Stakes, 2 Wend. (N. Y.) 137; Eaton v. Hill, 50 N. H. 235; Jennings v. Rundall, 8 Term R. 335; Green v. Greenback, 4 E. C. L. 377.



must also be of a legal nature; for, if it is immoral or against law, it is utterly void. But on these points we need not dwell, since they belong to the law of contracts generally. The same principles, in most, if not in all, these respects, apply in the Roman and foreign law;\* and Pothier deduces them from the general analogies which govern in other cases of contracts.†

Where possession is obtained under an invalid contract, a quasi bailment in the nature of a depositum is created by operation of law.

*Same—Consideration.*

A contract to make a loan in the future is, of course, not binding for want of a consideration.<sup>8</sup> After delivery, however, it seems that the contract should be held binding on both parties. The loss of an opportunity by the bailee to procure a loan elsewhere should be a sufficient consideration to hold the bailor to his agreement; and, of course, the use of the property is sufficient to bind the bailee. The point has not been definitely decided, however. "It is surprising how little in the way of decision in our courts is to be found in our books upon the obligations which a mere lender of a chattel for use contracts towards the borrower. \* \* \* It may, however, we think, be safely laid down that the duties of the borrower and lender are in some degree correlative."<sup>9</sup>

*Must be without Intended Compensation to the Bailor.*

Absence of intended compensation to the bailor for the use of his chattel by the bailee is of the essence of this class of bailments.‡ Its gratuitous nature is what distinguishes it from all other bailments. The presence or absence of compensation determines the measure of the bailee's liability, and furnishes the principle of the modern classification of bailments. If any compensation is to be paid in any manner for the use of the property bailed, the bailment

\* Story, Ballm. § 229.

† Poth. Pret. à Usage, notes 13, 15.

<sup>8</sup> Thorne v. Deas, 4 Johns. (N. Y.) 84; Crosby v. German, 4 Wis. 373; Elsee v. Gatward, 5 Term R. 143; Shillibeer v. Glyn, 2 Mees. & W. 143.

<sup>9</sup> Coleridge, J., in Blakemore v. Bristol & E. Ry. Co., 8 El. & Bl. 1035, 1050. And see Clapp v. Nelson, 12 Tex. 370.

‡ Where valuable property is used for a considerable time, a hiring and not a loan will be presumed. Rider v. Rubber Co., 28 N. Y. 379; Cullen v. Lord, 39 Iowa, 302.



falls under another denomination,—that of hire. However, the bailee must bear the ordinary expenses incidental to the preservation of the property during the time of the bailment,<sup>10</sup> and the fact that he does so will not change its gratuitous nature. Thus, if a horse is lent to a friend for a journey, he must bear the expenses of his food and shelter during that journey, and even of getting him shod, if necessary; for these are burdens naturally incident to the use of a horse.<sup>11</sup> However, where a horse or other property is loaned in distinct consideration of its keep, the bailment is one for hire.<sup>12</sup> The question is one of construction of the bailment contract. Where the use of the property was the principal thing contemplated by the parties, and the keep merely incidental, the bailment is a loan. Where the custody and care of the property was also an object aimed at, the bailment is one for hire.

*Must be for Exclusive Use of Bailee.*

In gratuitous loans, the use must be the principal object, and not merely incidental, and the use must be exclusively for the bailee's benefit. If the use is for the joint benefit of the borrower and the lender, the bailment is not a loan, but another species of bailment,—one for hire.

*General Requisites.*

As has been seen, the absence of any compensation to the bailor is the distinguishing feature of this class of bailments. It follows from this, as a corollary, that a loan can never be created by operation of law, but only by contract. In all other respects, the principles governing the formation of bailments in general are applicable

<sup>10</sup> See post, p. 87.

<sup>11</sup> *Bennett v. O'Brien*, 37 Ill. 250.

<sup>12</sup> *Carpenter v. Branch*, 13 Vt. 161. "Where the owner of an article of property is anxious to avoid the expense and trouble of caring for it, at a season of the year when its use is not more than equivalent to the expense of keeping, and at his solicitation another agrees to keep it for its use, the lender is as much accommodated by the transaction as the borrower, and the benefit is mutual." *Chamberlin v. Cobb*, 32 Iowa, 161. In *Neel v. State*, 33 Tex. Cr. R. 408, 26 S. W. 726, it was held that an agreement whereby a person undertakes to make a horse gentle, and fit for the use of the owner's family, in consideration of permission to ride it, is a contract of hiring, and not a gratuitous loan.

to loans.<sup>14</sup> Thus, the property loaned must be personalty, but may be either corporeal or incorporeal. Property consumable in use, however, such as wine, corn, or money, cannot be gratuitously loaned for such use. It would be impossible to return such property after the fulfillment of the bailment, and the transaction would amount to a gift. If the loan was to be repaid in other property of like kind, it would be a Roman *mutuum*, or, at common law, virtually a sale or exchange. Such property, however, may be loaned for any other use which is consistent with its ultimate specific return. Thus, corn or wine might be loaned for the purpose of being pledged by the bailee to raise money. Delivery is as essential in the case of a gratuitous loan as it is in the case of a deposit or mandate. It marks the inception of the bailment. Until the delivery, neither party is bound by an agreement to make a loan, for there is no consideration.<sup>15</sup> The rights and liabilities of the parties become fixed immediately upon the delivery and acceptance. The intention of the parties at that time controls the character of the bailment. Absolute title in the bailor or lender is not essential to the creation of a valid loan as between the parties. A special property in, or even a bare possession of, the thing, is sufficient to enable one to make a loan good as against all the world save the true owner. The rule was the same at civil law, which held that even a thief might lend the stolen property, and recover it back as against every one but the rightful owner.\*

#### RIGHTS AND LIABILITIES OF PARTIES.

21. While the special contract in each case is controlling, the normal rights and liabilities of borrower and lender are as follows:

- (a) The borrower must bear the ordinary expenses incidental to preserving the property while in use, but for any extraordinary expense the lender is liable (p. 87).

<sup>14</sup> See ante, p. 10.

<sup>15</sup> *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Crosby v. German*, 4 Wis. 373; *Elsee v. Gatward*, 5 Term R. 143; *Shillibeer v. Glyn*, 2 Mees. & W. 145.

\* Story, Bailm. § 230.

- (b) The lender is liable for damages resulting from his negligence in lending a defective article (p. 88).
- (c) Fraud in procuring the loan renders the borrower liable as an insurer (p. 88).
- (d) The borrower may use the property only for the purpose, at the place, and in the manner contemplated by the contract (p. 89).
- (e) Either borrower or lender may sue third persons for wrongful interference with the property loaned (p. 90).
- (f) The due care demanded from a borrower consists in the exercise of great or extraordinary diligence (p. 92).

The rights and liabilities of the parties to a loan are controlled by the terms of the contract entered into at the time of the lending. Most of what follows under this head may be regarded as general principles of construction, which will control in the absence of any express provision to the contrary. The parties may vary their liabilities at will, provided, only, their contract is not in violation of law or against public policy.

*Ordinary and Extraordinary Expenses.*

The borrower must bear the ordinary expenses incident to the use of the thing loaned, or necessary to its due preservation.<sup>16</sup> Thus, where domestic animals, as horses or cattle, are loaned, the borrower must bear the expense of feeding and caring for them, and, as has been seen, the benefit which the lender receives in being relieved of such burden is not sufficient to change the gratuitous nature of the bailment.<sup>17</sup> Where extraordinary and unusual expenses become necessary for the preservation of the property, the lender must bear them. If the borrower has advanced such expenses, the lender must reimburse him; and it seems that the borrower may bind the lender by contract for all necessary and reasonable expenses in the preservation of the property beyond those incidental to its ordinary use.<sup>18</sup>

<sup>16</sup> Harrington v. Snyder, 3 Barb. (N. Y.) 380.

<sup>17</sup> Bennett v. O'Brien, 37 Ill. 250.

<sup>18</sup> Harter v. Blanchard, 64 Barb. (N. Y.) 617.

*Liability of Lender for Defects.*

It is the duty of the lender to warn the borrower of the defective or dangerous nature of the articles loaned. He must not expose the borrower to danger from hidden faults without warning, and if he does so, and damage results, he is liable. This liability does not arise out of the loan, but rests on the general principles of negligence, and it is common to all classes of bailments.<sup>19</sup> If the owner was unaware of such defects and dangers,<sup>20</sup> or if they were equally apparent to both parties, there is no liability, for there was no duty to give notice of the danger. It is not wrongful to lend a defective or dangerous chattel, provided the circumstances do not make it a trap.

*Fraud in Procuring Loan.*

Any fraud practiced by the borrower to procure the loan vitiates the contract. In such a case the owner has not legally consented to the taking and use of his property. The pretended borrower is no better than a trespasser.<sup>21</sup> He is therefore absolutely liable for the property, irrespective of the question of negligence. He is an insurer of safety. The fraud may be either an express misrepresentation or an injurious concealment. In the first case, liability is very clear. Judge Story<sup>22</sup> gives as an illustration of the doctrine of tacit fraud the following, taken originally from Pothier: If a soldier were to borrow the horse of a friend for a battle, expected to be fought the next morning, and were to conceal from the lender the fact that his own horse was as fit for the service, if the borrowed horse were slain in the engagement, the borrower would be responsible, for the natural presumption created by the concealment is that the horse of the borrower is unfit, or that he has none. But,

<sup>19</sup> A lender of a chattel is responsible for defects in it with reference to the use for which the loan is accepted, of which he is aware, and owing directly to which the borrower is injured. *Blakemore v. Bristol & E. Ry. Co.*, 8 El. & Bl. 1035. See *MacCarthy v. Young*, 6 Hurl. & N. 329. See, also, ante, p. 10.

<sup>20</sup> *MacCarthy v. Young*, 6 Hurl. & N. 329; *Blakemore v. Bristol & E. Ry. Co.*, 8 El. & Bl. 1035, 1050.

<sup>21</sup> *Campbell v. Stakes*, 2 Wend. (N. Y.) 137; *Cary v. Hotelling*, 1 Hill (N. Y.) 311.

<sup>22</sup> *Bailm.* § 243.

if the borrower had frankly stated that fact, then the loss must be borne by the lender.

### *Right to Use.*

The understanding on which the loan is made limits the right to use the property. Articles loaned for one purpose cannot be used for another. The lender has the right to prescribe the conditions upon which he is willing to lend his property. Where the lender has fixed the time, place, or mode of use, any departure from such limitations is a tort, and renders the borrower strictly liable.<sup>23</sup> For example, to take a case supposed by Lord Holt,<sup>24</sup> if a man lends another his horse to go westward or for a month, and the bailee goes northward or keeps the horse above a month, the bailee will be chargeable if any accident happens on the northern journey or after the expiration of the month, because he has made use of the horse contrary to the trust it was lent to him under.<sup>25</sup>

A gratuitous loan is to be regarded as strictly personal, unless, from other circumstances, a different intention can fairly be presumed.<sup>26</sup> A borrower has ordinarily no right to, in turn, lend the property to another.<sup>27</sup> The intention of the parties, of course, con-

<sup>23</sup> *Collins v. Bennett*, 46 N. Y. 490; *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5; *Euchanan v. Smith*, 10 Hun, 474; *Wheelock v. Wheelwright*, 5 Mass. 104; *Isaack v. Clark*, 2 Bulst. 306; *Cullen v. Lord*, 39 Iowa, 302; *Kennedy v. Ashcraft*, 4 Bush (Ky.) 530; *Stewart v. Davis*, 31 Ark. 318; *Martin v. Cuthbertson*, 64 N. C. 328; *Booth v. Terrell*, 16 Ga. 25; *Lay's Ex'r v. Lawson's Adm'r*, 23 Ala. 377; *Woodman v. Hubbard*, 25 N. H. 67; *Grant v. Ludlow's Adm'r*, 8 Ohio St. 1. If, after a conversion, the owner receives the property back, he can still recover for any damage he has sustained; that is, the value of the property when received goes in mitigation of damages. *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Bowman v. Teall*, 23 Wend. (N. Y.) 306; *Gibbs v. Chase*, 10 Mass. 125; *Wheelock v. Wheelwright*, 5 Mass. 104; *Todd v. Figley*, 7 Watts (Pa.) 542; *Bayliss v. Fisher*, 7 Bing. 153; *Syeds v. Hay*, 4 Term R. 260, 264. See, also, post, p. 186.

<sup>24</sup> In *Coggs v. Bernard*, 2 Ld. Raym. 909, 915, 916. And see *De Tollener v. Fuller*, 1 Mill, Const. S. C. (N. S.) 121; *Vaughan v. Menlove*, 3 Bing. N. C. 468, 475.

<sup>25</sup> *Stewart v. Davis*, 31 Ark. 518; *Hart v. Skinner*, 16 Vt. 138.

<sup>26</sup> *Bringloe v. Morrice*, 1 Mod. 210, 3 Salk. 271; *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5.

<sup>27</sup> *Wilcox v. Hogan*, 5 Ind. 546.



trols.<sup>28</sup> Thus, in *Bringloe v. Morrice*<sup>29</sup> the plaintiff had loaned his horse to defendant to ride for pleasure, and it was held that the defendant had no right to permit his servant to ride the horse. But in *Camoy's v. Scurr*<sup>30</sup> it was held that one in possession of a horse for the purpose of trying it with a view to a purchase was entitled to put a competent person on the horse for the purpose of trying it, and was not limited to merely trying it himself. So, also, if a horse should be loaned for the bailee's use for a fixed time, it is a fair presumption that the parties intended that the bailee might use the horse through his servants.<sup>31</sup> Every case must rest on its own facts.<sup>32</sup>

*Right of Action against Third Persons.*

There is the same confusion of ideas with reference to the nature of the borrower's interest in the property loaned that there is in the case of deposits and mandates. Some authors claim that the borrower has a special property in the subject of the loan,<sup>33</sup> and others that he has merely a possessory interest.<sup>34</sup> Perhaps the inquiry is more curious than practical, as all agree that the borrower may maintain an action for the wrongful disturbance of his possession.<sup>35</sup>

<sup>28</sup> *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5; *Wilcox v. Hogan*, 5 Ind. 546; *Bringloe v. Morrice*, 1 Mod. 210.

<sup>29</sup> 1 Mod. 210, 3 Salk. 271.

<sup>30</sup> 9 Car. & P. 383.

<sup>31</sup> *Camoy's v. Scurr*, 9 Car. & P. 383.

<sup>32</sup> *Ray v. Tubbs*, 50 Vt. 688. One who borrows a vehicle having a seat for two may take another person with him, unless otherwise stipulated. *Harrington v. Synder*, 3 Barb. (N. Y.) 380. The bailee is not liable for depreciation due to the contemplated use. *Beller v. Schultz*, 44 Mich. 529, 7 N. W. 225; *Parker v. Gaines* (Ark.) 11 S. W. 693.

<sup>33</sup> See ante, p. 58.

<sup>34</sup> *Taylor v. Lendey*, 9 East, 49; *Burton v. Hughes*, 2 Bing. 173. See *Faulkner v. Brown*, 13 Wend. (N. Y.) 63.

<sup>35</sup> *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114; *Paddock v. Wing*, 16 How. Prac. 547; *Hurd v. West*, 7 Cow. (N. Y.) 753; *Hendricks v. Decker*, 35 Barb. (N. Y.) 298; *Barker v. Miller*, 6 Johns. (N. Y.) 195; *Duncan v. Spear*, 11 Wend. (N. Y.) 54; *Badlam v. Tucker*, 1 Pick. (Mass.) 389; *Nicolls v. Bastard*, 2 Crompt. M. & R. 859; *Burton v. Hughes*, 2 Bing. 173; *Sutton v. Buck*, 2 Taunt. 302; *Rooth v. Wilson*, 1 Barn. & Ald. 59. As to trover by the bailee, see *Waterman v. Robinson*, 5 Mass. 303; *Burton v. Hughes*, supra; *Armory v. Delamirie*, 1 Strange, 505; *Ogle v. Atkinson*, 5 Taunt. 759. The bailee



It would seem, however, that if the loan were for a definite period, and the owner had no right to recall the loan before the expiration of that period,—a point not free from doubt,—the borrower would have a special property in the loan.<sup>36</sup> But if the loan is for an indefinite period, and the owner has power to resume possession at any time, then, perhaps, the bailee cannot be said to have a special property in the loan, but merely a possessory interest. The lender, however, may also maintain an action.<sup>37</sup> A recovery by either the lender or the borrower is a bar to an action by the other.<sup>38</sup>

may sue and recover, although he is not liable to the bailor. Where a bailee received a horse from the owner with the understanding that he might use him, and, if satisfied with him, purchase him, held, that such bailee had a sufficient right of property in the horse to maintain an action against a party to whom he had let the horse, for injuries resulting from overdriving. *Harrison v. Marshall*, 4 E. D. Smith (N. Y.) 271. And see *White v. Philbrick*, 5 Greenl. (Me.) 147; *Campbell v. Phelps*, 1 Pick. (Mass.) 62; *Adams v. Broughton*, 2 Strange, 1078; *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Broome v. Wooter*, Yel. 67j. Cf. *Little v. Fossett*, 34 Me. 545, with *Lockhart v. Railroad*, 73 Ga. 472; *Baggett v. McCormack* (Miss.) 19 South. 89.

<sup>36</sup> See post, p. 96.

<sup>37</sup> *Orser v. Storms*, 9 Cow. (N. Y.) 687; *Thorp v. Burling*, 11 Johns. (N. Y.) 285; *Hurd v. West*, 7 Cow. (N. Y.) 753; *Putnam v. Wyley*, 8 Johns. (N. Y.) 432; *Hoyt v. Gelston*, 13 Johns. (N. Y.) 141; *Booth v. Terrell*, 16 Ga. 21, 25; *Smith v. Milles*, 1 Term R. 475, 480; *Lotan v. Cross*, 2 Camp. 464; *Nicolls v. Bastard*, 2 Crompt., M. & R. 659. And see *Roberts v. Wyatt*, 2 Taunt. 268, 275. In *Orser v. Storms*, 9 Cow. (N. Y.) 687, it was held that one who had a right to personal property loaned for an indefinite time might maintain trespass for the taking of it. The court said: "The first question to be considered is whether the plaintiff had such a property in the cattle as to be able to maintain trespass. For this purpose he must have had the actual or constructive possession at the time; and the latter is when he has such a right as to be entitled to reduce the goods to actual possession at any time. \* \* \* In my opinion, the plaintiff had the right to bring this action." See, also, *Pulliam v. Burlingame*, 81 Mo. 111. As holding that a lender for a fixed time has not such constructive possession, see *Putnam v. Wyley*, 8 Johns. (N. Y.) 432; *Hoyt v. Gelston*, 13 Johns. (N. Y.) 142; *Aiken v. Buck*, 1 Wend. (N. Y.) 466. The bailor may maintain trespass against one who wrongfully takes the goods from the bailee even by legal process. *Root v. Chandler*, 10 Wend. 110.

<sup>38</sup> *Faulkner v. Brown*, 13 Wend. (N. Y.) 63; *Hall v. Tuttle*, 2 Wend. (N. Y.) 475, 479; *Flewelling v. Rave*, 1 Bulst. 68.

*Borrower Liable for Slight Negligence.*

It is the borrower's duty to exercise great or more than ordinary diligence in the care of the property loaned.<sup>39</sup> He is not liable for loss or damage due to inevitable accident, vis major, or the ordinary

<sup>39</sup> *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5; *Phillips v. Coudon*, 14 Ill. 84; *Bennett v. O'Brien*, 37 Ill. 250; *Hagebush v. Ragland*, 78 Ill. 40; *Howard v. Babcock*, 21 Ill. 259; *Green v. Hollingsworth*, 5 Dana (Ky.) 173; *Fortune v. Harris*, 6 Jones (N. C.) 532; *Ross v. Clark*, 27 Mo. 549; *Wood v. McClure*, 7 Ind. 155; *Carpenter v. Branch*, 13 Vt. 161; *Vaughan v. Menlove*, 3 Bing. N. C. 468, 475. If bailment be for exclusive benefit of bailee, greatest care and attention is necessary to discharge him in case of loss; hence bailee of negress was held liable when he sent her where smallpox was known to be raging, and she sickened and died of that disease. *De Tollenere v. Fuller*, 1 Mill. Const. (S. C.) 117. In *Watkins v. Roberts*, 28 Ind. 167, which was a suit for the value of a borrowed horse, the answer was that the horse was borrowed to go to a certain place and return, and that while on his way, and without fault or negligence on his part, the borrower was met by soldiers, who took the horse by force. The answer was held good. In *De Fonclear v. Shottenkirk*, 3 Johns. (N. Y.) 170, where it was shown that a slave was delivered to a party on trial, and that, upon being allowed to go on an errand, he ran away, it was held that the bailee was not responsible. *Agricultural society, inviting persons to lend articles for exhibition at fair, and promising to take care of them, is responsible if they are stolen by its negligence.* *Vigo Agricultural Soc. v. Brumfiel*, 102 Ind. 146, 1 N. E. 382. Where a horse loaned by plaintiff to defendant was carried to defendant's house, and placed in the common horse lot, so used for many years, though it was somewhat slanting, and the horse, being nearly blind, and the weather being wet, slipped and fell upon a stump, breaking its thigh, held, that these facts did not import such negligence as to render defendant liable for the loss of the property. *Fortune v. Harris*, 6 Jones (N. C.) 532. Owner of a flag lent it to his employer, helped to hoist it on employer's building, and left it flying when he went away. It was afterwards injured by a hailstorm. Held, in absence of proof of negligence, that borrower was not liable. *Beller v. Schultz*, 44 Mich. 529, 7 N. W. 225. One who, at owner's request, takes a drive in a sulky, is liable for injury to it occasioned by his want of common prudence. *Carpenter v. Branch*, 13 Vt. 161. In a suit brought by the lender against the borrower of a horse, which died in the possession of the latter, after the plaintiff proved the character of the bailment and the death of the horse in the bailee's hands, it devolved on the latter to show he had exercised the degree of care required by the nature of the bailment. *Bennett v. O'Brien*, 37 Ill. 250. And see *Logan v. Mathews*, 6 Pa. St. 417; *Bush v. Miller*, 13 Barb. (N. Y.) 481; *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25; *Platt v. Hibbard*, 7 Cow. (N. Y.) 497, note; *Doorman v. Jenkins*, 2 Adol. & E. 256, 259; *Marsh*

wear and tear,<sup>40</sup> unless he negligently or willfully exposed it to the danger of such loss, or negligently failed to avert it.<sup>41</sup> But very slight negligence is sufficient to render him liable. Lord Holt<sup>42</sup> said that the borrower is bound to "the strictest care and diligence; \* \* \* that, if the bailee be guilty of the least neglect, he will be answerable." This was the rule of the civil law, where "exactissima diligentia" marked the degree of diligence exacted.<sup>43</sup> The rule at common law requires such diligence as one more than ordinarily careful would bestow upon his own property under like circumstances.

A borrower must, of course, exercise at all times the most perfect good faith. He must keep within the terms of the loan. A different use from that authorized by the lender is a misuse, and renders the borrower strictly liable.<sup>44</sup> But where he is using the property in the very manner contemplated, and damage results from causes for which he is in no way responsible, he is not liable, for he is guilty of no wrong.<sup>45</sup> Borrowers are not insurers, unless they make themselves so either by their contract or by their positive wrong.<sup>46</sup> The

v. Horne, 5 Barn. & C. 322; Harris v. Packwood, 3 Taunt. 264. If an injury happen to property in the hands of the borrower, the interference of the lender to remedy the evil will not release the bailee from responsibility for negligence. Todd v. Figley, 7 Watts. (Pa.) 542; Eastman v. Sanborn, 3 Allen, 594. And see Bayliss v. Fisher, 7 Bing. 153. See, generally, Bennett v. O'Brien, 37 Ill. 250; Phillips v. Coudon, 14 Ill. 84; Moore v. Westervelt, 27 N. Y. 234, 243; Esmay v. Fanning, 9 Barb. 176.

<sup>40</sup> Hyland v. Paul, 33 Barb. (N. Y.) 245; Watkins v. Roberts, 28 Ind. 167; Wood v. McClure, 7 Ind. 155; Fortune v. Harris, 6 Jones (N. C.) 532; Abraham v. Nunn, 42 Ala. 51; Yale v. Oliver, 21 La. Ann. 454.

<sup>41</sup> Read v. Spaulding, 30 N. Y. 630; Bowman v. Teall, 23 Wend. (N. Y.) 310; Wing v. New York & E. R. Co., 1 Hilt. (N. Y.) 235; Davis v. Garrett, 6 Bing. 716.

<sup>42</sup> In Coggs v. Bernard, 2 Ld. Raym. 909, 915.

<sup>43</sup> Story, Bailm. § 238.

<sup>44</sup> Buchanan v. Smith, 10 Hun, 474; Lane v. Cameron, 38 Wis. 603; Cullen v. Lord, 39 Iowa, 302; McMahon v. Sloan, 12 Pa. St. 229; Kennedy v. Ashcraft, 4 Bush (Ky.) 530; Martin v. Cuthbertson, 64 N. C. 328; Stewart v. Davis, 31 Ark. 518; Crump v. Mitchell, 34 Miss. 449. See ante, note 23.

<sup>45</sup> Wood v. McClure, 7 Ind. 155; Watkins v. Roberts, 28 Ind. 167; Fortune v. Harris, 6 Jones (N. C.) 532.

<sup>46</sup> Hard v. Neaving, 44 Barb. (N. Y.) 472; Rockwell v. Nearing, 35 N. Y.

parties may by contract vary their liabilities almost at will.<sup>47</sup> Mr. Schouler<sup>48</sup> suggests, however, that, in the case of gratuitous loans, courts should be reluctant to construe an agreement so as to reduce the borrower's measure of responsibility, but should rather lean towards a construction that the borrower had specially assumed the liability of an insurer. A contract to "return or account for" certain bonds borrowed for the purpose of pledging has been held to be an absolute engagement to be responsible for the bonds under all circumstances, and the borrower was accordingly held liable where the bonds were stolen without his fault.<sup>49</sup> This case is very doubtful, and certainly pushes the principle to an extreme.

A borrower's character, habits, and skill, so far as known to the lender, may be considered in determining what care or skill was expected by the parties. The lender cannot require greater skill on the part of the borrower than he had a right to presume the borrower was capable of bestowing.<sup>50</sup> If a spirited horse be lent to a raw youth, and the owner knew him to be such, the circumspection of an experienced rider cannot be required; and what would be negligence in the one would not be so in the other.<sup>51</sup>

There is a question of rather theoretical than practical interest, which has been more or less discussed by all writers upon bailments, viz.: If a man's house is on fire, so that he has not time to save both his own and the borrowed chattels, is he bound to give the borrowed chattels preference? The question is answered in the affirmative by the civil law and the French and Louisiana Codes.\* Pothier,† while admitting the question to be of some difficulty, concludes that the borrower must give the borrowed chattels the preference, on the

302; *Beller v. Schultz*, 44 Mich. 529, 7 N. W. 225; *Whitehead v. Vanderbilt*, 19 Daly (N. Y.) 214; *Camoy's v. Scurr*, 9 Car. & P. 383.

<sup>47</sup> *Archer v. Walker*, 38 Ind. 472. But see *Watkins v. Roberts*, 28 Ind. 167. See, also, ante, p. 10.

<sup>48</sup> Bailm. 84.

<sup>49</sup> *Archer v. Walker*, 38 Ind. 472.

<sup>50</sup> *Moore v. Larry*, 15 Gray, 451; *Knowles v. Atlantic & St. L. R. Co.*, 38 Me. 55; *Eastman v. Patterson*, 38 Vt. 146.

<sup>51</sup> *Bellé v. South Devon Ry. Co.*, 12 Wkly. Rep. 1115; *Wilson v. Brett*, 11 Mees. & W. 113; *Fortune v. Harris*, 6 Jones (N. C.) 532; *Story*, Bailm. § 245; 2 *Rest. Comm.* 575, and note.

\* Code Napoleon, art. 1852; Rev. Civ. Code La. art. 2871.

† *Pret. & Usage*, note 56.

ground that he engages for the greatest diligence, and that nothing but vis major or inevitable accident will excuse him. Kent<sup>52</sup> sanctions Pothier's view, except where the owner's goods are very much more valuable than the borrowed chattels, in which case the more valuable goods should be first saved. Judge Story<sup>53</sup> questions the correctness of these views. He concludes, and the weight of reason seems to be with him, that the test of liability in cases of this sort is whether or not there is any negligence in not saving the borrowed goods. Where both his own and the borrowed goods could not be saved, and he saved his own, there cannot be any negligence, unless there was a superior duty to save the borrowed goods and sacrifice his own. Mr. Story seems to deny the existence of such a duty in the common calamity. Mr. Schouler<sup>54</sup> aptly points out that the idea of a superior duty grows out of the false test of measuring diligence by the bailee's eventual conduct towards his own, instead of the conduct of the average man of his class.<sup>55</sup> The fact that a borrower saves his own, and not the borrowed, goods, leaves him open to suspicion, but he may well be able to show that his conduct was consistent with due diligence. The presence or absence of the superior duty to save the borrowed goods is a question of fact dependent on all the circumstances, such as the relative value, bulk, situation, and general nature of the goods. As Mr. Schouler has well put it, the bottom problem in the case is whether, in his anxiety to save his own goods, the borrower slackened in the duty he owed of acting with honor and great diligence in endeavoring to preserve the borrowed property safely.

#### TERMINATION OF LOAN.

**22. A loan may be terminated in various ways; inter alia:**

- (a) By accomplishment of its purpose (p. 96).
- (b) By operation of law (p. 96).
- (c) By mutual consent (p. 96).

<sup>52</sup> 2 Comm. (13th Ed.) 575.

<sup>53</sup> Bailm. §§ 245-249b.

<sup>54</sup> Bailm. 82.

<sup>55</sup> See *Delaware Bank v. Smith*, 1 Edm. Sel. Cas. (N. Y.) 351; *Anderson v. Foresman*, Wright (Ohio) 598; *Bland v. Womack*, 2 Murph. (N. C.) 373.



(d) By the borrower's wrong (p. 97).

(e) By either party at his option, except—

**EXCEPTION**—Where the loan is for a definite time, it is doubtful whether the lender can terminate it before that time has expired (p. 97).

A loan may be terminated in many ways.<sup>56</sup> Where it was made for a limited time, or for a special purpose, mere lapse of time or accomplishment of the purpose will terminate it.\* When the borrower becomes full owner, his interest as bailee merges in the higher title, and the loan is terminated by operation of law. The parties, by mutual consent, may, of course, abandon the bailment. So, also, the death of the borrower, if not of itself terminating the bailment, at least gives the lender a right to do so.<sup>57</sup> Whether the death of the lender terminates the bailment is not so clear. It would depend on the nature of the borrower's interest in the property. If it is strictly precarious, the lender's death would, at least, give his representatives a right to immediately terminate the loan. If the bailee has a special property in the borrowed chattel, the death of the lender would not affect the loan. Where the loan was for an indefinite time, the lender may recall it at any time.<sup>58</sup> A loan of this kind was called a "precarium" in the civil law. It is often said that, even when the loan is for a fixed period, the lender may nevertheless

<sup>56</sup> A sale by the bailor of his interest terminates the loan (when it is for an indefinite time). *Parker v. Tiffany*, 52 Ill. 286; *Hodges v. Hurd*, 47 Ill. 363.

\* On the expiration of the stipulated time, the lender may, without demand, maintain an action to recover the property loaned. *Clapp v. Nelson*, 12 Tex. 370.

<sup>57</sup> *Smiley v. Allen*, 13 Allen, 465.

<sup>58</sup> *Putnam v. Wiley*, 8 Johns. (N. Y.) 432; *Orser v. Storms*, 9 Cow. (N. Y.) 687; *Neff v. Thompson*, 8 Barb. (N. Y.) 213; *Green v. Hollingsworth*, 5 Dana (Ky.) 173; *Pulliam v. Burlingame*, 81 Mo. 111, 116; *Clapp v. Nelson*, 12 Tex. 370; *Lyle v. Perry*, 1 Dyer, 486; *Smith v. Milles*, 1 Term R. 480; *Taylor v. Lendey*, 9 East, 49; *Clark's Case*, 2 Leon. 30. But the rule is otherwise in Louisiana. Code, art. 2877. Delay of three weeks in returning watch indefinitely loaned for use is not unreasonable. *Green v. Hollingsworth*, 5 Dana (Ky.) 173. Where loan is for indefinite time, lender must make demand before bringing suit. *Payne v. Gardiner*, 29 N. Y. 146.



recall it at pleasure. Judge Story<sup>59</sup> says that every loan is understood, as to its continuance, to rest upon the good faith and good pleasure of the lender, and to be strictly precarious. But both Mr. Story<sup>60</sup> and Mr. Schouler<sup>61</sup> think that the bailee ought to be able to recover damages if the premature termination results in injury to him. If the bailor had a right to terminate the bailment at any time, it is hard to see on what principle damages could be awarded. The more reasonable view is that, when a loan is for a fixed time, the lender cannot terminate the loan before that time.<sup>62</sup> This was the rule of the civil law.<sup>63</sup> The detriment to the borrower in failing to make other arrangements for his needs is a sufficient consideration to bind the lender to his promise. The borrower's distinct wrong or violation of the contract gives the lender a right to recall the loan.<sup>64</sup> Any attempt to transfer the property or to deal with it as his own would be such a wrong. A lender should ordinarily make a demand when he wishes to terminate the bailment, but, when a demand would be futile, none need be made.<sup>65</sup>

Until a demand and refusal to return property loaned for an indefinite time, the statute of limitations does not begin to run against the bailor.<sup>66</sup>

<sup>59</sup> Bailm. § 277.

<sup>60</sup> Bailm. §§ 258, 271.

<sup>61</sup> Bailm. 87.

<sup>62</sup> See *Root v. Chandler*, 10 Wend. (N. Y.) 110; *Hoyt v. Gelston*, 13 Johns. (N. Y.) 142; *Bringloe v. Morrice*, 1 Mod. 210.

<sup>63</sup> Story, Bailm. § 271.

<sup>64</sup> *Hurd v. West*, 7 Cow. (N. Y.) 752; *Esmay v. Fanning*, 9 Barb. (N. Y.) 176; *McMahon v. Sloan*, 12 Pa. St. 229; *Crump v. Mitchell*, 34 Miss. 449; *Cooper v. Willomatt*, 1 C. B. 672; *Wilkinson v. Verity*, L. R. 6 C. P. 206.

<sup>65</sup> *Ross v. Clark*, 27 Mo. 549. See *Clapp v. Nelson*, 12 Tex. 370. In a suit to recover the value of a chattel loaned, the lender must show a demand, or that the property has been lost or destroyed by the defendant's negligence, or that he has converted it to his own use. *Ross v. Clark*, 27 Mo. 549. Where property is loaned for a definite period, or for a day or two, and is not returned within the longer time, an action may be sustained to recover it or its value, without a demand. *Clapp v. Nelson*, 12 Tex. 370.

<sup>66</sup> *Payne v. Gardiner*, 29 N. Y. 146; *Kelsey v. Griswold*, 6 Barb. (N. Y.) 436; *Huntington v. Douglass*, 1 Rob. (N. Y.) 204; *Bruce v. Tilson*, 25 N. Y. 194; *Roberts v. Bardell*, 61 Barb. (N. Y.) 37; *Roberts v. Sykes*, 30 Barb. (N. Y.) 173.

**SAME—REDELIVERY.**

**23.** At the termination of the loan, the property must be restored by the borrower, together with its increments.

The thing borrowed is not only to be returned, but everything that is accessorial to it. Thus, the young of an animal, born during the time of the loan, is to be restored; and the income of stock, which has been lent to the borrower to enable him to pledge it, as a temporary security, also belongs to the lender.<sup>87</sup>

In regard to the place where the thing is to be returned, only general principles can be laid down. If no particular place is pointed out by the contract, it is to be returned to the lender at his usual dwelling house, unless the thing properly belongs elsewhere.<sup>88</sup> If the lender has in the meantime removed his domicile to another place, the borrower is not bound to follow it, and return the thing at the

<sup>87</sup> Orser v. Storms, 9 Cow. (N. Y.) 687; Hasbrouck v. Vandervoort, 4 Sandf. (N. Y.) 74; Booth v. Terrell, 16 Ga. 20, 25; Allen v. Delano, 55 Me. 113. When no time has been fixed for a termination of the loan, the return must be made in a reasonable time. Wilcox v. Hogan, 5 Ind. 546; Green v. Hollingsworth, 5 Dana (Ky.) 173; Ross v. Clark, 27 Mo. 549; Lay's Ex'r v. Lawson's Adm'r, 23 Ala. 377. The bailee is liable for breach of contract if he fails to return at the time specified. Fox v. Pruden, 3 Daly (N. Y.) 187; Clapp v. Nelson, 12 Tex. 370. The borrower is bound to return the article loaned at the time stipulated, or, if no time is fixed, in a reasonable time; and whether it had become his duty to return it or not, where a loss occurred, is a question of fact, to be found by a jury. Green v. Hollingsworth, 5 Dana (Ky.) 173. Where there has been a temporary exchange of articles of property, there is no principle that requires that the one shall be returned to the former owner before the other can be recovered. Hoell v. Paul, 4 Jones (N. C.) 75. A borrower of a chattel will not be permitted to set up title in himself until he has restored the chattel to the lender. Simpson v. Wrenn, 50 Ill. 222. And see Nudd v. Montanye, 38 Wis. 511.

<sup>88</sup> The plaintiff loaned his carriage, in June, to the defendant, it being then stored at a stable in the city in which both parties resided; and, in December following, the defendant returned it to the same stable, after the stable keeper had ceased to be plaintiff's agent. Held a conversion. It should have been returned to plaintiff at his residence. Esmay v. Fanning, 9 Barb. (N. Y.) 176, 5 How. Prac. 228. And see Rutgers v. Lucet, 2 Johns. Cas. (N. Y.) 92.

new residence; but he is bound only to return it at the former residence, unless, indeed, there is but a trifling difference in the distance between them.<sup>69</sup> The common law seems not to have laid down any special rules on the subject, but has left the decision to be made upon the particular circumstances of each case, as it shall arise, according to the presumed intention of the parties.<sup>70</sup>

It is wholly immaterial whether the thing is returned to the lender or to his authorized agent, or by the borrower or by his agent.<sup>71</sup> If the thing has been properly delivered to the agent of the lender, the borrower will be discharged, although it never comes to the possession of the lender, by the fraud or neglect of the agent.<sup>72</sup>

The borrower cannot retain the thing borrowed for any antecedent debt due to him. This is the rule of the Roman and foreign law, as well as of the common law.<sup>73</sup> The plain reason is that it would be a departure from the tacit obligations of the contract. No intention to give a lien for a debt can be implied from the grant of a mere favor.

Generally speaking, the property loaned is to be restored to the lender or person entitled to the custody, unless it has been agreed that the restitution shall be to some other person. If the lender is dead, it is to be restored to his personal representative, if known.<sup>74</sup> If not known or no administration is taken on his estate, the borrower may detain the thing until an administration is made known. If the lender is a woman, and she afterwards marries, restitution is to be made to her husband, and not to her personally. So, if the lender has been put under guardianship, the return must be to his guardian. And if the lender has become non compos mentis or a lunatic, and has no guardian, a redelivery to him will not be good;

<sup>69</sup> But see *Esmay v. Fanning*, supra.

<sup>70</sup> As to the place of making a demand for a return, see *Mason v. Briggs*, 16 Mass. 453; *Franchot v. Leash*, 5 Cow. (N. Y.) 506.

<sup>71</sup> *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5.

<sup>72</sup> *Story*, Bailm. § 262. But a delivery to one not authorized to receive the property is a conversion, though made in good faith and without negligence. *Packard v. Getman*, 4 Wend. (N. Y.) 613; *Coykendall v. Eaton*, 55 Barb. (N. Y.) 188; *Devereux v. Barclay*, 2 Barn. & Ald. 702; *Stephenson v. Hart*, 4 Bing. 476; *Green v. Hollingsworth*, 5 Dana (Ky.) 173.

<sup>73</sup> *Story*, Bailm. § 264.

<sup>74</sup> *Booth v. Terrell*, 16 Ga. 20, 26; *Smiley v. Allen*, 13 Allen, 465.

but the thing must be kept until a competent party exists to whom it may be delivered. But a redelivery to a minor will be good if he has not any guardian appointed over him; and, even if he has a guardian, if the thing has been usually intrusted to the minor by his guardian.\*

Even if the lender is not the owner of the thing, the borrower must ordinarily restore it to him,<sup>75</sup> and has no right to set up the title of a mere stranger against him; for the lender has, by his contract, a right to be reinstated in his possession.<sup>76</sup> However, if, in the meantime, a recovery has been had against the borrower without his default, or if the thing has been attached in his hands in an adverse suit, that will constitute a sufficient excuse.<sup>77</sup> If the borrower actually restores the thing to the true and real owner, without any injury or injustice to the lender, he will no longer be liable to any action.<sup>78</sup> In like manner, if the thing is taken out of the possession of the borrower by the real owner,<sup>79</sup> or if, upon a threat by such owner to sue him, he has delivered up the thing to him, he will be discharged.<sup>80</sup> If the loan has been to several persons jointly, they are all responsible in *solido* (each for the whole) for the return; and, of course, a return by one is a discharge of all, as a misuser by one is a misuser by all.

\* Story, Ballm. § 265.

<sup>75</sup> Nudd v. Montanye, 38 Wls. 511; Simpson v. Wrenn, 50 Ill. 222.

<sup>76</sup> But he may set up an assignment in bankruptcy. Lain v. Gaither, 72 N. C. 234.

<sup>77</sup> Edson v. Weston, 7 Cow. (N. Y.) 278; The Idaho, 93 U. S. 575. And see Biddle v. Bond, 34 Law J. Q. B. 137; Wilson v. Anderton, 1 Barn. & Adol. 450; Cheesman v. Exall, 6 Exch. 341; European & A. Royal Mail Co. v. Royal Mail Steam-Packet Co., 8 Jur. (N. S.) 136. Cf. Sheridan v. New Quay Co., 4 C. B. (N. S.) 650.

<sup>78</sup> Whittier v. Smitl., 11 Mass. 211; The Idaho, 93 U. S. 575.

<sup>79</sup> Shelbury v. Scotsford, Yel. 23. And see Watkins v. Roberts, 28 Ind. 167.

<sup>80</sup> Littledale, J., in Wilson v. Anderton, 1 Barn. & Adol. 450, 457.

*End. Jan 11th 1881*

## CHAPTER IV.

## BAILMENTS FOR MUTUAL BENEFIT—PLEDGE.

- 24. In General.
- 25. Pledge Defined.
- 26. Establishment of Relation.
- 27-29. Title of Pledgor.
- 30. What may be Pledged.
- 31-32. Delivery.
- 33. Rights and Liabilities—Of Pledgor.
  - (a) Implied Warranty of Title.
  - (b) Interest Assignable.
  - (c) Interest Subject to Judicial Sale.
  - (d) Right to Sue Third Persons.
  - (e) Right to Redeem.
- 34. Of Pledgee before Default.
  - (a) Interest Assignable.
  - (b) Title Acquired by Pledgee.
  - (c) Special Property of Pledgee.
  - (d) Right to Use the Pledge.
  - (e) Profits of the Pledge.
  - (f) Expenses of the Pledge.
  - (g) Care Required by the Pledgee.
  - (h) Redelivery of the Pledge.
- 35. Of Pledgee after Default.
  - (a) Suit on the Pledge Debt.
  - (b) Sale of Pledged Property.
- 36. Termination of Pledge.

## IN GENERAL.

**24. Bailments for the mutual benefit of the bailor and bailee may be divided into two classes:**

- (a) **Pignus**, or pledge (p. 102).
- (b) **Locatio**, or hiring (p. 177).

The general principles applicable to gratuitous bailments are in the main applicable to mutual benefit bailments also. The fundamental distinction is that in the latter class of bailments each party contemplates receiving some benefit or advantage from the bailment.



On this fact depend many important differences in the rights and liabilities of the parties. It is immaterial whether the benefit is in fact ultimately received or not. Even a contingent benefit is sufficient to bring a bailment into this class. But it is essential that the bailment be constituted with the intention of securing such benefit. This benefit, while commonly money on one part at least, may be anything else of value. For example, when one hires a horse, the money paid on one hand, and the use of the horse on the other, make the bailment one for mutual benefit. So, in the case of a pledge or pawn, the benefit on one side consists in procuring the loan, and on the other in having security.\*

Bailments of this class are created for an almost infinite variety of purposes. They constitute by far the most numerous class of bailments, and their importance justifies a very much more elaborate and detailed discussion than has been given to the subject of gratuitous bailments. For the purpose of indicating subdivisions in the analysis of mutual benefit bailments, the names of the corresponding classes in the civil law have been used, they being the natural and logical divisions of the subject, and having the advantage of familiarity. Bailments for the mutual benefit of the parties are accordingly divided into two classes,—*pignus*, or pledge; and *locatio*, or hiring. Each will be considered in turn.

#### PLEDGE DEFINED.

**25. A pledge or pawn is a bailment to secure the payment of a debt, or the performance of an engagement, accompanied by a power of sale in case of default.**

##### *Historical.*

The giving possession of a chattel to secure a debt or to insure the performance of some engagement is of great antiquity, and laws governing such pawns or pledges are to be found among all the nations of ancient times. An instance of this is to be found in the regulations of the Mosaic law as to the taking of pledges, and this law is especially noticeable by reason of the care taken of the inter-

\* For presumptions as to intended benefit, see ante, p. 45, "Bailments for Bailor's Sole Benefit."



ests of the pledgor, and the prohibition of undue severity on the part of the pledgee. Thus, it is said: "No man shall take the nether or the upper millstone to pledge, for he taketh a man's life to pledge." In another place it is commanded: "If thou at all take thy neighbor's raiment to pledge, thou shalt deliver it to him by that the sun goeth down." Similar laws are also to be found among the Chinese. Among the Romans the subject of pledges was recognized and regulated by law, and from these laws may easily be traced the origin of many of the rules of our law in regard to this branch of bailments. In English history the first to make a profession of loaning money upon the bailment of personal chattels as security therefor were the Jews; and for their risk they demanded the most exorbitant interest, this in some cases amounting to the rate of 65 per cent. After the expulsion of the Jews under Edward I., the Lombards acquired a monopoly of the business of pawnbroking. At this time, and in fact until 1546, the taking of interest for loans was unlawful; and it is from the date just given that we can trace the recognition of pawnbroking as a business, and its regulation by the law of England. From that time to the present the law has acknowledged the justice of allowing one who wishes to borrow money or secure accommodation from another to deliver property to the lender as a security for the debt, and of permitting the lender to demand interest for the use of his money. Each party has been by law secured in his respective rights, and guarded so far as possible from extortion or fraud on the part of the other.

In many countries, as in France, the business of pawnbroking is carried on as a public institution, by which money may be borrowed by the poor at a reasonable rate of interest. In England and in this country, however, it is carried on, as any other enterprise, by individuals; and in almost all of the states the business is regulated by statute. Pawnbrokers are those who make a business of ~~loaning~~ *lending* money on the security of corporeal property, rather than incorporeal property, such as stocks or warehouse receipts.

#### *Definitions.*

As in the case of other bailments, many and various definitions of a pledge or pawn have been given. The earliest to be found in the English law is that given by Lord Holt,<sup>1</sup> who defines it as exist-

<sup>1</sup> In *Coggs v. Bernard*, 2 Ld. Raym. 909, 913.

ing "when goods or chattels are delivered to another, to be a security to him for money borrowed of him by the bailor." By Sir William Jones <sup>2</sup> it is defined to be "a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged." In both of these definitions there is no recognition of the fact that the pledge need not be solely to secure the payment of money, but may also be for the purpose of insuring the performance of some engagement on the part of the bailor, or even of a third party, on whose account the bailor has made the bailment. This defect is, in a measure, remedied in Mr. Story's <sup>3</sup> definition of a pledge as "a bailment of personal property as security for some debt or engagement." Similar to this is Mr. Schouler's <sup>4</sup> statement that it is "the bailment of a chattel as security for some debt or engagement." The definition given by Mr. Jones in his work on Pledges <sup>5</sup> is substantially the same as that of the black-letter text.<sup>6</sup> He says, "A pledge may be defined to be a deposit of personal property as security, with an implied power of sale upon default." This last proposition, the power of sale upon default, which the other writers quoted have omitted, is a very important part of the definition of a pledge, for in the power of sale lies the principal distinction between pledges and liens.<sup>7</sup> Thus, a mechanic who has a lien for his work and materials has no legal right to sell the chattel for his reimbursement. It is a right "to retain," "to keep possession of," "to detain," etc., until he is paid. Such a right is said to be a personal right to detain, in contradistinction to an interest in the property; and if the party parts with the article, by a pledge, sale, or otherwise, he loses his lien.<sup>8</sup> Hence the distinction between such a lien for work and materials,<sup>9</sup> as given by what was anciently called the "custom of the

<sup>2</sup> Bailm. 35.

<sup>3</sup> Bailm. § 286.

<sup>4</sup> Bailm. 158.

<sup>5</sup> Jones, Pledges, 1.

<sup>6</sup> An assignment by deed of all an heir's interest in his ancestor's estate, to secure an indebtedness to the estate, has been held a pledge. *In re Handy's Estate*, 167 Pa. St. 552, 31 Atl. 983; *Stearns v. Marsh*, 4 Denio (N. Y.) 227.

<sup>7</sup> *Pothonier v. Dawson*, Holt, N. P. 383; *Doane v. Russell*, 3 Gray (Mass.) 382, 383; *Thames Iron-Works Co. v. Patent Derrick Co.*, 1 Johns. & H. 93.

<sup>8</sup> See post, p. 233.

<sup>9</sup> See post, p. 223.

realm," or now the "general law," and an express pawn or pledge of goods, by the owner, as collateral security for a loan of money. In the latter case it is now held that when the debt has become due, and remains unpaid, the creditor, after a reasonable time, may sell the pledge;<sup>10</sup> but otherwise when there is a mere lien, as in the case of mechanics, innkeepers, and others, by custom.<sup>11</sup> Special cases growing out of the nature of the property pledged, in which a sale is improper, will be considered later.

In the Roman law a pledge or pawn is called "pignus," but it was the rule of the civil law that a pledge could never be sold, unless authorized by special agreement, except under a judicial sentence; and this appears to be the law at this day in many countries in Europe, and it was the rule in the old English law in the time of Glanville.<sup>12</sup> In the Roman law, also, a pawn (pignus) was distinguished from a hypothecation (hypotheca), in this: that in the former the possession was delivered to the pawnee; in the latter, it was retained by the pawner. However, the words "pignus" and "hypotheca" seem often to have been confounded.<sup>13</sup>

*Same—Statutory Definitions.*

In a number of states pledges have been defined by statute. Thus, in California, "a pledge is a deposit of personal property by way of security for the performance of another act."<sup>14</sup> And this definition has been copied by the Dakota and Idaho Codes.<sup>15</sup> In Georgia the following definition is given: "A pledge or pawn is property deposited with another as security for the payment of a debt. Delivery of the property is essential to this bailment, but promissory notes and evidences of debt may be delivered in pledge. The delivery of title deeds creates no pledge."<sup>16</sup> The Louisiana law is that "the pledge is a contract by which one debtor gives something to his creditor as a security for his debt."<sup>17</sup>

<sup>10</sup> Doane v. Russell, 3 Gray (Mass.) 382; and see post, p. 162.

<sup>11</sup> See post, p. 233.

<sup>12</sup> Lib. 10, cc. 1, 6; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62.

<sup>13</sup> Story, Bailm. § 286; Doak v. Bank, 6 Ired. (N. C.) 309.

<sup>14</sup> Civ. Code Cal. § 2986.

<sup>15</sup> Civ. Code Dak. § 1757.

<sup>16</sup> Code Ga. 1882, § 2138.

<sup>17</sup> Rev. Civ. Code La. 1870, art. 3133.

*Same—Collateral Security.*

The term "collateral security" has come into quite frequent use of late, in designating pledges of incorporeal personality. But the term is also applied to transactions which are in fact chattel mortgages, and it is often used loosely and improperly in other senses.<sup>18</sup>

*Lien and Pledge Distinguished.*

Pledges are most nearly allied to liens and to chattel mortgages.

In the case of a lien, as in that of a pledge, the bailor retains the general property in the chattel, and the bailee has only a special property. It is the right which is given by this special property in each case which distinguishes the lien from the pledge. In the former the bailee, by virtue of his special property in the chattel, has himself the right to retain the thing; but this is only a personal right, and may not be transferred. Upon this point it was said by Lord Ellenborough, C. J., in *McCombie v. Davies*,<sup>22</sup> that "nothing could be clearer than that liens were personal, and could not be transferred to third persons by any tortious pledge of the principal's goods." With regard to the distinction between liens and pledges, Chief Justice Gibbs, in *Pothonier v. Dawson*,<sup>23</sup> said: "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But, when goods are deposited by way of security to indemnify a party against a loan of money, \* \* \* the lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade." If the one having the lien, parts with the possession of the goods, unless, indeed, to one who is his own agent, and with the intent that such agent shall have merely the custody of them, he thereby loses his lien; but in the case of the pledge the bailor gives the bailee the right to exercise authority over the thing, even to the extent of transferring it, if the debt is not paid or the covenant performed by the stipulated time.<sup>24</sup>

*Chattel Mortgage and Pledge Distinguished.*

In the case of a chattel mortgage, the title to the thing passes to the mortgagee, but will be defeated by the payment by the mortgagor of his debt within the stipulated time. In the case of a pledge the title remains in the pledgor, and, until the expiration of the time in

<sup>18</sup> *Penney v. Lynn*, 58 Minn. 371, 59 N. W. 1043.

<sup>22</sup> 7 East, 6.

<sup>23</sup> *Holt*, N. P. 383, 385.

<sup>24</sup> See post, p. 133.

which he may regain possession by payment of his debt or performance of his covenant, the pledgee is nothing more than a bailee of the chattel. Mr. Powell, in his *Treatise on Mortgages*,<sup>25</sup> says, "The striking distinction between a mortgage of lands or goods, and a pawn of goods, is that in the former case the mortgagee has, after the condition forfeited, an absolute interest in the thing mortgaged, whereas the pawnee has but a special property in the goods, to detain them for his security."<sup>26</sup> A mortgage is a pledge, and more; for it is a pledge, to become an absolute interest, if not redeemed at a certain time.<sup>27</sup> A pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, which, by express stipulation, or the course of trade is to be a lien upon them."<sup>28</sup>

<sup>25</sup> 1 Pow. Mortg. 3.

<sup>26</sup> *Jones v. Smith*, 2 Ves. Jr. 372; *Ryall v. Rolle*, 1 Atk. 165; *Cortelyou v. Lansing*, 2 Caines, Cas. (N. Y.) 200; *Barrow v. Paxton*, 5 Johns. (N. Y.) 258; *Strong v. Tompkins*, 8 Johns. (N. Y.) 76; *McLean v. Walker*, 10 Johns. (N. Y.) 471; *Wilson v. Little*, 2 N. Y. 443; *Haskins v. Kelly*, 1 Rob. (N. Y.) 160; *Parshall v. Eggert*, 52 Barb. (N. Y.) 367; *Winchester v. Ball*, 54 Me. 558; *Walcott v. Keith*, 22 N. H. 196; *Whittle v. Skinner*, 23 Vt. 531; *Wright v. Ross*, 36 Cal. 414; *Heyland v. Badger*, 35 Cal. 404; *Dewey v. Bowman*, 8 Cal. 145; *Waldie v. Doll*, 29 Cal. 556; *Goldstein v. Hort*, 30 Cal. 372; *Gay v. Moss*, 34 Cal. 125; *Ponce v. McElvy*, 47 Cal. 154; *Meyerstein v. Barber*, L. R. 2 C. P. 38, 51; *Id.*, L. R. 4 H. L. 317; *Ratcliff v. Davies*, Cro. Jac. 244; *Tannahill v. Tuttle*, 3 Mich. 104; *Bryson v. Rayner*, 25 Md. 424. Shares of corporate stock may be pledged, and, although their owner transfers them absolutely in form, yet if the intention of the parties is that the transferee shall hold them only as security for money lent, and that the owner may redeem them at any time (even after the loan falls due) before the lender has exercised his power of sale, the transaction is a pledge, not a mortgage. *Wilson v. Little*, 2 N. Y. 443. The pledge of personal property is a "mortgage" thereof, within the attachment act, the word being therein used in a general sense, meaning security; and, by receiving such pledge as security for a debt, the creditor gives up his right to enforce his debt by attachment. *Payne v. Bensley*, 8 Cal. 260.

<sup>27</sup> *Lickbarrow v. Mason*, 6 East, 21, 25; *Sims v. Canfield*, 2 Ala. 555; *Brown v. Bement*, 8 Johns. (N. Y.) 75; *McLean v. Walker*, 10 Johns. (N. Y.) 471; *Eastman v. Avery*, 23 Me. 248; *Day v. Swift*, 48 Me. 368; *Gleason v. Drew*, 9 Greenl. (Me.) 79, 82; *Haven v. Low*, 2 N. H. 13; *Ash v. Savage*, 5 N. H. 545; *Lewis v. Stevenson*, 2 Hall (N. Y.) 63, 83; *Homes v. Crane*, 2 Pick. (Mass.) 605, 610; *Ward v. Sumner*, 5 Pick. (Mass.) 59, 60; *Bonsey v. Amee*, 8 Pick. (Mass.) 236.

<sup>28</sup> *Portland Bank v. Stubbs*, 6 Mass. 421, 425; *Tucker v. Buffington*, 15 Mass.



In cases where it is uncertain as to whether the transaction in question is a mortgage or a pledge, it will, if the facts will bear out such a construction, be held to be a pledge. Whether a transaction amounts technically to a mortgage or a pledge is sometimes a nice question, but the ultimate object of the inquiry is not so much to name the transaction as to ascertain what was the intention and understanding of the parties to it; and therefore such intent, when ascertained, ought to control. In the case of a pledge the creditor takes the possession, actual or constructive, of the goods; while in that of a mortgage there is a transfer of the title to him, but not necessarily of the possession. In all cases, then, where personal property is given as a security for a debt or engagement, accompanied by a change of possession, either actual or constructive, the transaction better comports with the character of a pledge than a mortgage; and where the transaction imports nothing more than giving a security, without a sale or change of title of the property, the law favors the conclusion that it was intended as a pledge, and not a mortgage.<sup>29</sup>

*Sale and Pledge Distinguished.*

The distinction between a sale and a bailment, in general, was pointed out at some length in the first chapter,<sup>30</sup> and here only a few applications of those rules to cases of pledges will be mentioned. Thus, an absolute bill of sale, accompanied by a delivery of the property, may be shown to be a pledge, if such was the intention of the parties.<sup>31</sup> And this construction will be preferred, as stated in the

476, 480; *Fletcher v. Howard*, 2 Alk. 115; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 449.

<sup>29</sup> *Lucketts v. Townsend*, 3 Tex. 119; *Wilson v. Brannan*, 27 Cal. 258, 271; *Lewis v. Varnum*, 12 Abb. Prac. (N. Y.) 305, 308; *Warren v. Emerson*, 1 Curt. 239, 241, Fed. Cas. No. 17,195; *West v. Crary*, 49 N. Y. 423, 425; *Woodworth v. Morris*, 56 Barb. (N. Y.) 97, 104; *Bank of British Columbia v. Marshall*, 11 Fed. 19. A pledge need not be recorded as a chattel mortgage. *First Nat. Bank of Cincinnati v. Kelly*, 57 N. Y. 34; *Parshall v. Eggert*, 54 N. Y. 18; *Griffin v. Rogers*, 38 Pa. St. 382; *McCready v. Haslock*, 3 Tenn. Ch. 13; *Shaw v. Wilshire*, 65 Me. 485; *Harris v. Birch*, 9 Mees. & W. 591; *Ward v. Sumner*, 5 Pick. (Mass.) 58, 59; *Wright v. Bircher*, 5 Mo. App. 322; *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Atwater v. Mower*, 10 Vt. 75.

<sup>30</sup> See ante, p. 6.

<sup>31</sup> *Walker v. Staples*, 5 Allen (Mass.) 34; *Whitaker v. Sumner*, 20 Pick. (Mass.) 399; *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Kimball v. Hildreth*,

last paragraph, to one which would make the transaction a mortgage.<sup>82</sup> But there may be a conditional bill of sale, which will constitute a mortgage.<sup>83</sup> In the same way a bill of sale with an agreement to repurchase may be a pledge or a mortgage, according to the circumstances and intention of the parties.<sup>84</sup> The necessity of distinguishing between a sale and a pledge often arises when securities are assigned by a debtor to a creditor.<sup>85</sup> The presumption is always that the transfer was as collateral security for his indebtedness, and not in payment of it.<sup>86</sup>

### ESTABLISHMENT OF RELATION.

26. In addition to what is essential to any bailment, for the establishment of a pledge there must be:

(a) Mutual assent of the parties (p. 109).

(b) A debt or engagement secured (p. 111).

*Must be Established by Contract.*

Pledges cannot be created by operation of law. They arise only by mutual agreement of the parties,<sup>87</sup> though this assent may be implied from their conduct, if not expressly given. That it must be voluntary has already been stated, in the discussion of the bailment contract in general.<sup>88</sup> The rules there given apply, of course, to the

8 Allen (Mass.) 167; Bright v. Wagle, 3 Dana (Ky.) 252; Ex parte Fitz, 2 Low. 519, Fed. Cas. No. 4,837; Newton v. Fay, 10 Allen (Mass.) 505; Jones v. Rahilly, 16 Minn. 320 (Gil. 283); Shaw v. Wilshire, 65 Me. 485; Morgan v. Dod, 3 Colo. 551; Blodgett v. Blodgett, 48 Vt. 32.

<sup>82</sup> Thompson v. Dolliver, 132 Mass. 103.

<sup>83</sup> Brown v. Bement, 8 Johns. (N. Y.) 75; Clark v. Henry, 2 Cow. (N. Y.) 824; Milliken v. Dehon, 27 N. Y. 364; Homes v. Crane, 2 Pick. (Mass.) 607; Fraker v. Reeve, 36 Wis. 85; Wood v. Dudley, 8 Vt. 430; Murdock v. Columbus Ins. Co., 59 Miss. 152; Gregory v. Morris, 96 U. S. 619; Laffin & Rand Powder Co. v. Burkhardt, 97 U. S. 110.

<sup>84</sup> Hines v. Strong, 46 How. Prac. (N. Y.) 97; Bright v. Wagle, 3 Dana (Ky.) 252.

<sup>85</sup> Standen v. Brown, 83 Hun, 610, 31 N. Y. Supp. 535.

<sup>86</sup> Jones v. Johnson, 3 Watts & S. (Pa.) 276; Perit v. Pittfield, 5 Rawle (Pa.) 166; Leas v. James, 10 Serg. & R. (Pa.) 307; Eby v. Hoopes, 1 Penny. (Pa.) 175.

<sup>87</sup> Mead v. Bunn, 32 N. Y. 275.

<sup>88</sup> Ante, p. 10. A pledge obtained by false representations of the pledgor

creation of a pledge, and will not be repeated in the following paragraphs, which will be devoted to the principles peculiar to pledges.

*Same—Legality.*

When the debt which the pledge is given to secure is void on account of illegality of consideration, the pledge is nevertheless effectual. Though the pledgee cannot recover on the debt itself, yet he can retain the pledge until redemption. The pledgor cannot recover possession without redeeming, because he would have to set up his own wrong;<sup>39</sup> and, for the same reason, the pledgee cannot set up the illegality to defeat redemption, when it is sought by the pledgor.<sup>40</sup>

*Same—Parties.*

The competency of infants, married women, and others, whose personal status varies from the normal, as parties to bailment contracts, has already been discussed.<sup>41</sup> A partner may pledge firm property for partnership debts without the consent of his copartners.<sup>42</sup> A corporation may pledge unissued stock held by it in trust for the advancement of its best interests.<sup>43</sup> So a company may pledge its own mortgage bonds.<sup>44</sup> The power of corporations to act as bailees has been stated in a previous chapter.<sup>45</sup>

vests no title in him, and the pledgee need not redeem, to entitle him to possession. *Mead v. Bunn*, 32 N. Y. 275.

<sup>39</sup> *Taylor v. Chester*, L. R. 4 Q. B. 309; *King v. Green*, 6 Allen (Mass.) 139.

<sup>40</sup> *King v. Green*, *supra*; *Jones, Pledges*, § 354.

<sup>41</sup> *Ante*, p. 16.

<sup>42</sup> *Smith v. Dennison*, 101 Ill. 531; *Galway v. Fullerton*, 17 N. J. Eq. 389; *Bohler v. Tappan*, 1 Fed. 469.

<sup>43</sup> *Combination Trust Co. v. Weed*, 2 Fed. 24.

<sup>44</sup> *Lehman v. Tallassee Manuf'g Co.*, 64 Ala. 567.

<sup>45</sup> *Ante*, p. 20. Where a corporation cannot legally hold the stock of another corporation, it cannot take such stock as a pledge. *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350. As to national banks as pledgees, see *Union Gold-Mining Co. v. National Bank*, 96 U. S. 640; *Germania Nat. Bank v. Case*, 99 U. S. 628; *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416, Fed. Cas. No. 12,801; *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190; *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208; *Hagar v. Union Nat. Bank*, 63 Me. 509.

*Debt Secured.*

In a pledge, the debt or contract which the deposit is made to secure is determined by the contract. It is immaterial whether the debt or engagement for which the security is given is that of the pledgor, or of some other person; for, if there is an assent by all the proper parties, it is equally obligatory in each case.<sup>46</sup> It may be delivered as security for a future debt<sup>47</sup> or engagement, as well as for a past debt;<sup>48</sup> for one or for many debts and engagements;<sup>49</sup> upon condition, or absolutely; for a limited time, or for an indefinite period.<sup>50</sup> A pledge may be made a continuing security, which will apply to any future transaction between the parties that is within the limits of the agreement.<sup>51</sup> It may also be implied from circumstances, as well as arise by express agreement; and it mat-

<sup>46</sup> A liability for another on a contract still in force is a sufficient consideration for a pledge, and the ratio of the consideration to the value of the thing pledged is of no importance. *Jewett v. Warren*, 12 Mass. 300. When a third person pledges his property as security for the payment of a debt or obligation of another, such property will occupy the same position as that of surety of the debtor, and any change in the contract of suretyship which would discharge a surety will release and discharge property so held as collateral. *Price v. Dime Sav. Bank*, 124 Ill. 317, 15 N. E. 754. The drawer of a note can pledge property to secure an accommodation acceptor, and also to protect the future holder of the note. *Britton v. Harvey*, 47 La. Ann. 259, 16 South. 747.

<sup>47</sup> *Leonard v. Kebler's Adm'r*, 50 Ohio St. 444, 34 N. E. 659; *Merchants' Nat. Bank of Savannah v. Demere*, 92 Ga. 735, 19 S. E. 38; *Clymer v. Patterson*, 52 N. J. Eq. 188, 27 Atl. 645. Or for future advances. *Merchants' Nat. Bank of Whitehall v. Hall*, 83 N. Y. 338; *Stearns v. Marsh*, 4 Denio (N. Y.) 227; *Badlam v. Tucker*, 1 Pick. (Mass.) 389, 398; *Jewett v. Warren*, 12 Mass. 300; *Macomber v. Parker*, 14 Pick. (Mass.) 497; *Holbrook v. Baker*, 5 Me. 309; *Eichelberger v. Murdock*, 10 Md. 373; *Wolf v. Wolf*, 12 La. Ann. 529; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *D'Wolf v. Harris*, 4 Mason, 515, Fed. Cas. No. 4,221; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 448.

<sup>48</sup> *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 448; *Stearns v. Marsh*, 4 Denio (N. Y.) 227; *Badlam v. Tucker*, 1 Pick. (Mass.) 389, 398; *Holbrook v. Baker*, 5 Me. 309; *D'Wolf v. Harris*, 4 Mason, 515, Fed. Cas. No. 4,221.

<sup>49</sup> *Mechanics' Traders' Bank v. Livingston*, 6 Misc. Rep. 81, 28 N. Y. Supp. 25; *Jones v. Bank*, 72 Hun, 344, 25 N. Y. Supp. 660.

<sup>50</sup> *Shirras v. Caig*, 7 Cranch, 34; *Hendricks v. Robinson*, 2 Johns. Ch. (N. Y.) 283, 309; *Stevens v. Bell*, 6 Mass. 339.

<sup>51</sup> *Merchants' Nat. Bank of Whitehall v. Hall*, 83 N. Y. 338; *Norton v. Plumb*, 14 Conn. 512.

ters not what is the nature of the debt or the engagement. The contract of pledge is not confined to an engagement for the payment of money; but it is susceptible of being applied to any other lawful contract whatever.

In all cases the pledge is understood to be a security for the whole and for every part of the debt or engagement, unless it is otherwise stipulated between the parties. The payment or discharge of a part, therefore, still leaves it a perfect pledge for the residue of the debt or engagement.<sup>52</sup> The pledge may, however, be to secure a part, only, of a debt.<sup>53</sup>

When new agreements are made, which are intended by the parties, either tacitly or expressly, to be attached to the pledge, the pledgee has a title and right of possession coextensive with the new engagements.<sup>54</sup> But the mere existence of a former debt due to the pledgee does not authorize him to detain the pledge for that debt, when it has been put into his hands for another debt or contract, unless there is some just presumption that such was the intention of the parties.<sup>55</sup> The like rule applies to a subsequent debt or loan contracted by the pledgor; for in such a case the new debt or loan will not be deemed to attach to the pledge, so that the pledgee may retain the same therefor,<sup>56</sup> unless the new loan was made upon

<sup>52</sup> *Baldwin v. Bradley*, 69 Ill. 32.

<sup>53</sup> *Fridley v. Bowen*, 103 Ill. 633, 637.

<sup>54</sup> *Demanday v. Metcalf*, Finch, Prec. 419.

<sup>55</sup> *Jarvis v. Rogers*, 15 Mass. 389; *Allen v. Megguire*, Id. 490; *Robinson v. Frost*, 14 Barb. (N. Y.) 536; *Neponset Bank v. Leland*, 5 Metc. (Mass.) 359; *James' Appeal*, 89 Pa. St. 54; *Russell v. Haddock*, 8 Ill. 233, 238; *Baldwin v. Bradley*, 69 Ill. 32; *St. John v. O'Connel*, 7 Port. (Ala.) 466; *Gilliat v. Lynch*, 2 Leigh (Va.) 493; *Mahoney v. Caperton*, 15 Cal. 314; *Bank of Metropolis v. New England Bank*, 1 How. 234; *Boughton v. U. S.*, 12 Ct. Cl. 330; *Thompson v. Dominy*, 14 Mees. & W. 403; *Vanderzee v. Willis*, 3 Brown, Ch. 21; *Brandao v. Barnett*, 3 C. B. 519, 530; *In re Meadows*, 28 Law J. Ch. 891; *Walker v. Birch*, 6 Term R. 258; *Rushforth v. Hadfield*, 7 East, 224; *Green v. Farmer*, 4 Burrows, 2214; *Buckley v. Garrett*, 60 Pa. St. 333; *Pheller v. Jewett*, 166 Pa. St. 456, 31 Atl. 204. Where a judgment is given as collateral security for a note which is afterwards paid, a parol agreement between the creditor and the agent of the debtor to continue such judgment as security for certain other notes of the debtor is valid against subsequent judgment creditors of such debtor without notice. *In re Mosser's Estate*, 161 Pa. St. 469, 29 Atl. 1.

<sup>56</sup> *Midland Co. v. Huchberger*, 46 Ill. App. 518; *Searight v. Bank* (Pa. Sup.)



the credit of the pledge.<sup>57</sup> If the debt secured bears interest, the pledge secures the payment of such interest.<sup>58</sup> And, when a pledge is made, it continues effectual until the debt secured is paid or discharged, notwithstanding the evidence of it is changed from a promissory note to a judgment of a court of record thereon.<sup>59</sup>

#### SAME—TITLE OF PLEDGOR.

27. The pledgor need not be absolute owner; a limited interest is sufficient. But a mere lien holder cannot make a pledge (except by statute) valid against the owner (p. 113).
28. In many states, by statute, factors have power to pledge goods consigned to them (p. 114).
29. One given the indicia of title by the owner may pledge the goods (p. 116).

#### *Pledgor Need not be Absolute Owner.*

It is not necessary that the pledgor be the absolute owner of the thing pledged.<sup>60</sup> He may have only a limited interest therein, such as a life interest,<sup>61</sup> or that of a pledgee,<sup>62</sup> though, where property is pledged by one having such a limited interest, the pledgee acquires no right to sell on default,<sup>63</sup> because to do so would divest the rights of the ultimate owner. But he can sell whatever interest the pledgor has. The purchaser in such case merely gets a right to hold the property as long as the pledgor could have held it.<sup>64</sup>

29 Atl. 783; *Baldwin v. Bradley*, 69 Ill. 32; *Adams v. Sturges*, 55 Ill. 468; *Gilliat v. Lynch*, 2 Leigh (Va.) 493.

<sup>57</sup> *Van Blarcom v. Broadway Bank*, 9 Bosw. (N. Y.) 532; *Id.*, 37 N. Y. 540; *Smith v. Dennison*, 101 Ill. 531; *Buchanan v. International Bank*, 78 Ill. 500.

<sup>58</sup> *Boardman v. Holmes*, 124 Mass. 438; *Charles v. Coker*, 2 S. C. 122.

<sup>59</sup> *Fisher v. Fisher*, 98 Mass. 303.

<sup>60</sup> But a partner cannot pledge partnership property as security for his private debts. *Olipphant v. Markham*, 79 Tex. 543. A joint owner in possession may pledge his own interest, but not that of the co-owner, without the latter's consent. *Frans v. Young*, 24 Iowa, 375.

<sup>61</sup> *Hoare v. Parker*, 2 Term R. 376.

<sup>62</sup> See post, p. 134.

<sup>63</sup> *Robertson v. Wilcox*, 36 Conn. 426.

<sup>64</sup> *Jones*, Pledges, § 60.

However, one who has only a lien on personal property cannot make a valid pledge of it. If he attempts to do so, his pledgee cannot hold it against the owner, even for the amount of the lien.<sup>65</sup> This is on the theory that a lien is a personal right to retain possession, and cannot be assigned. But in California<sup>66</sup> and the Dakotas<sup>67</sup> it is provided by statute that a lien holder may pledge property in his possession, to the extent of his lien.

*Factors. Cannot pledge*

Although a factor or broker has a lien on his principal's goods for advances made, yet at common law he cannot pledge them.<sup>68</sup> When goods are so attempted to be pledged, the title and right of property of the owner are not divested by his own act, or by his authority. The factor has authority to sell, and a sale passes a good title from the owner. But the factor has no authority to pledge goods consigned to him. His acts attempting to do so are void, and vest no title in the pledgee.<sup>69</sup>

The rights of the principal and factor depend on the law merchant, which has been adopted by the common law. . By this law a

<sup>65</sup> *McCombie v. Davies*, 7 East, 5.

<sup>66</sup> Civ. Code Cal. § 2990.

<sup>67</sup> Civ. Code Dak. § 1761.

<sup>68</sup> *Kennedy v. Strong*, 14 Johns. (N. Y.) 127; *Rodriguez v. Hefferman*, 5 Johns. Ch. (N. Y.) 417; *Newbold v. Wright*, 4 Rawle (Pa.) 195; *Kinder v. Shaw*, 2 Mass. 397; *Gray v. Agnew*, 95 Ill. 315; *Kelly v. Smith*, 1 Blatchf. 290, Fed. Cas. No. 7,675; *Van Amringe v. Peabody*, 1 Mason, 440, Fed. Cas. No. 16,825; *Warner v. Martin*, 11 How. 208; *First Nat. Bank of Macon v. Nelson*, 38 Ga. 391; *Wright v. Solomon*, 19 Cal. 64; *Merchants' Nat. Bank of Memphis v. Trenholm*, 12 Heisk. (Tenn.) 520; *McCreary v. Gaines*, 55 Tex. 485; *Paterson v. Tash*, 2 Strange, 1178; *Daubigny v. Duval*, 5 Term R. 604; *Newsom v. Thornton*, 6 East, 17; *Graham v. Dyster*, 2 Starkie, 21; *Martini v. Coles*, 1 Maule & S. 140; *Shipley v. Kymer*, Id. 484; *Solly v. Rathbone*, 2 Maule & S. 298; *Cockran v. Irlam*, Id. 301, note; *Boyson v. Coles*, 6 Maule & S. 14; *Fielding v. Kymer*, 2 Brod. & B. 639; *Queiroz v. Trueman*, 3 Barn. & C. 342; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401. But cf. *Hutchinson v. Bours*, 6 Cal. 384; *Leet v. Wadsworth*, 5 Cal. 404; *Wright v. Solomon*, 19 Cal. 64; *Miller v. Schneider*, 19 La. Ann. 300; *McCreary v. Gaines*, 55 Tex. 485; *First Nat. Bank v. Nelson*, 38 Ga. 391.

<sup>69</sup> *Hoffman v. Noble*, 6 Metc. (Mass.) 68, *Bott v. McCoy*, 20 Ala. 578. The factor, however, cannot disaffirm the pledge on the ground that he had no authority to make it. *Bott v. McCoy*, 20 Ala. 578.

factor is but the attorney of his principal, and he must pursue the powers delegated to him.<sup>70</sup> The party receiving such a pledge, and advancing his money, acquires no title, as against the principal. Nor is it material in such a case whether the pledgee knew that he was dealing with a factor or not. If he knew the fact, he was bound to know that by law the factor had no authority to pledge the goods of his principal. If he did not know that the person with whom he was dealing was a factor, still his want of knowledge of this fact could not extend the authority of the factor. As such an act is not within the ordinary powers of a factor, it is clear that it cannot work a divestiture of the title of the principal; and he may pursue the goods in the hands of the pledgee, or may bring trover against both the pledgee and factor, or either of them, at his election.<sup>71</sup>

But a factor may deliver the possession of goods on which he has a lien, to a third person, with notice of the lien, and with a declaration that the transfer is to such person as agent of the factor, and for his benefit. This is a continuance, in effect, of the factor's possession.<sup>72</sup>

*Same—Statutory Power to Pledge.*

In a number of states, however, the rules of the common law as to factors have been changed by statute.<sup>73</sup> These enactments make it possible for persons dealing with factors to take pledges of goods held by the latter, and, by so doing, acquire rights superior to

<sup>70</sup> *Kinder v. Shaw*, 2 Mass. 398; *McCreary v. Gaines*, 55 Tex. 485.

<sup>71</sup> *Bott v. McCoy*, 20 Ala. 578; *Kinder v. Shaw*, 2 Mass. 397; *McCreary v. Gaines*, 55 Tex. 485; *Phillips v. Huth*, 6 Mees. & W. 572, 596; *Martini v. Coles*, 1 Maule & S. 140; *Baring v. Corrie*, 2 Barn. & Ald. 137; *McComble v. Davies*, 6 East, 538. But see *Clutchinson v. Bours*, 6 Cal. 384; *Story*, Ag. § 437.

<sup>72</sup> *Urquhart v. M'Iver*, 4 Johns. (N. Y.) 103; *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.) 440; *Bowie v. Napier*, 1 McCord (S. C.) 1; *Blair v. Childs*, 10 Heisk. (Tenn.) 199; *First Nat. Bank of Louisville v. Boyce*, 78 Ky. 42. *Contra*, *Merchants' Nat. Bank of Memphis v. Trenholm*, 12 Heisk. (Tenn.) 520.

<sup>73</sup> 1 Stim. Am. St. Law, §§ 4380-4385. New York, 2 Rev. St. 1875, p. 1168, §§ 1, 5; 3 Rev. St. 1882, p. 2257. Ohio, 1 Rev. St. 1880, §§ 3214, 3218. Massachusetts, Gen. St. 1860, c. 54; Pub. St. 1882, c. 71. Pennsylvania, Bright. & Purd. Dig. 1873, p. 664. Wisconsin, Rev. St. 1878, pp. 854, 855, §§ 3345-3347. Maryland, Rev. Code 1878, pp. 291, 292, 294, §§ 3, 5, 6, 14. Rhode Island, Gen. St. 1872, p. 261, c. 123; Pub. St. 1882, c. 136. Louisiana, Act 1874, No. 66.

those of the owner, who, by placing the property in the factor's hands, clothes him with apparent ownership. If the pledgee takes the goods knowing that the pledgor holds them as a factor, then the pledge is subject to the rights of the owner. The statutes are designed merely for the protection of bona fide pledgees.<sup>74</sup> Nor, on the other hand, is the factor given any right to pledge his principal's goods without the latter's consent. The owner may maintain an action against the factor for the tort.<sup>75</sup> The factor's acts, as they are called, apply in most of the states only to factors to whom the goods are consigned for sale, and not to mere consignees.<sup>76</sup> The owner may, in all cases, recover the goods pledged, by paying the amount which the pledgee has advanced.

*Indicia of Title.*

On the principle of the factor's acts, it is held that an owner of goods who clothes another with the indicia of ownership cannot take them from one to whom they have been pledged in reliance thereon, and without notice of the owner's rights.<sup>77</sup> Thus, in a conditional sale, where the vendee is in possession, and pledges the

<sup>74</sup> *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399; *Evans v. Trueman*, 1 Moody & R. 10.

<sup>75</sup> *Stollenwerck v. Thacher*, 115 Mass. 224.

<sup>76</sup> *Jennings v. Merrill*, 20 Wend. (N. Y.) 9; *Stevens v. Wilson*, 6 Hill (N. Y.) 512; *Id.*, 3 Denio (N. Y.) 472; *Cartwright v. Wilmerding*, 24 N. Y. 521; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283; *Kinsey v. Leggett*, 71 N. Y. 387; *Howland v. Woodruff*, 60 N. Y. 72; *Chicago Taylor Printing Press Co. v. Lowell*, 60 Cal. 454; *Nickerson v. Darrow*, 5 Allen (Mass.) 419; *Stollenwerck v. Thacher*, 115 Mass. 224; *Cole v. Northwestern Bank*, L. R. 10 C. P. 354; *Fuentes v. Montis*, L. R. 3 C. P. 368; *Id.*, L. R. 4 C. P. 93; *Johnson v. Credit Lyonnais*, 2 C. P. Div. 224; *Pickering v. Busk*, 15 East, 38; *Boyson v. Coles*, 6 Maule & S. 14; *Dyer v. Pearson*, 3 Barn. & C. 38.

<sup>77</sup> *Calais Steamboat Co. v. Seudder*, 2 Black (U. S.) 372; *Babcock v. Lawson*, 4 Q. B. Div. 394. Where an agent fraudulently misappropriates negotiable collaterals deposited with him on a loan of the principal's money, the borrower offering to pay the loan at maturity, the principal is liable to him for the value of the collaterals at that time. *Reynolds v. Witte*, 13 S. C. 5. A clerk or salesman has no power to pawn his employer's assets as security for his own debts. *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569. But, for cases where it was held that the pledgor did not have sufficient indicia of ownership, see *Agnew v. Johnson*, 22 Pa. St. 471; *Gallaher v. Cohen*, 1 Browne (Pa.) 43; *Branson v. Heckler*, 22 Kan. 424; *Cox v. McGuire*, 26 Ill. App. 315.

property to one who has no notice of the vendor's rights, the pledgee can hold the property as against the vendor.<sup>78</sup> So, an administrator may make a valid pledge of personal property belonging to the estate, because the legal title is in him.<sup>79</sup> But, if the pledgee knows that the administrator is not acting lawfully, he takes the pledge affected with a trust in favor of the estate. A pledge of property held by an administrator, as such, to secure a private debt, would be notice to the pledgee of a violation of duty.<sup>80</sup>

If a man obtains goods under color of a contract intended to transfer the property in the goods to him, and then pledges them, the pledgee will have a lien upon the goods to the amount of his advance. As, for example, if a man purchases and obtains possession of a specific chattel, and pays for it by a fictitious bill of exchange, or by a check on a banker where he has no funds, and then pledges the article with a party who advances money upon it without any knowledge of the fraud, the pledgee will have a lien for his advances against the vendor who has been defrauded. But if the article has been stolen, and then pledged, the pledgee will have no lien upon it, as against the owner.<sup>81</sup> The reason of the distinction between these two classes of cases rests on the principle that no one can be deprived of his property without his consent. Where a sale has been induced by fraud, the vendor has consented that the title shall pass, and though, as between the immediate parties, the contract may be avoided by reason of the fraud, yet it cannot be against a bona fide pledgee. On the other hand, in the case of stolen goods there is no consent that the title shall pass, and a

<sup>78</sup> *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 190; *Western Union R. Co. v. Wagner*, 65 Ill. 197; *Ohio & M. Ry. Co. v. Kerr*, 49 Ill. 458; *Jennings v. Gage*, 13 Ill. 610; *Brundage v. Camp*, 21 Ill. 329.

<sup>79</sup> *Pickens v. Yarborough's Adm'r*, 26 Ala. 417; *Carter v. Manufacturers' Nat. Bank of Lewistown*, 71 Me. 448; *Leitch v. Wells*, 48 N. Y. 585; *Hutchins v. State Bank*, 12 Metc. (Mass.) 421; *Bayard v. Farmers' & Mechanics' Bank*, 52 Pa. St. 232; *Woods' Appeal*, 92 Pa. St. 379; *Petrie v. Clark*, 11 Serg. & R. (Pa.) 377; *Russell v. Piacce*, 18 Beav. 21; *Vane v. Rlgden*, L. R. 5 Ch. App. 663.

<sup>80</sup> *Wilson v. Doster*, 7 Ired. Eq. (N. C.) 231; *Gray v. Armistead*, 6 Ired. Eq. (N. C.) 74; *Tyrrell v. Morris*, 1 Dev. & B. Eq. (N. C.) 559.

<sup>81</sup> *Duel v. Cudlipp*, 1 Hilt. (N. Y.) 166. See *Hoffman v. Carrow*, 22 Wend. (N. Y.) 285.



pledgee acquires no better right to the goods than the pledgor has.<sup>82</sup>

### SAME—WHAT MAY BE PLEDGED.

30. Any personal property, corporeal or incorporeal, may be pledged, except (by statute):

EXCEPTIONS—(a) Pay of soldiers (p. 118).

(b) Pensions given by the United States (p. 118).

Any legal or equitable interest whatever in any personal property may be pledged, provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual delivery of possession, because it is a delivery of the means of obtaining possession.\* And debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge.<sup>83</sup>

By the Roman law, certain things were prohibited from being put in pawn,—such as the necessary apparel and furniture, beds, utensils, and tools of the debtor; his plows, and other utensils for tillage; things esteemed sacred in the Roman law; the benevolence or pension or bounty of a monarch; and the pay and emoluments of officers and soldiers.<sup>84</sup> But the common law allows a debtor to pledge any of his property, whether it consist of necessities, or other things. However, no assignment of pay by a noncommissioned officer or private in the United States army, previous to his discharge, is valid.<sup>85</sup> And no pledge of any right, claim, or interest in any pension granted

<sup>82</sup> *Arendale v. Morgan*, 5 Sneed (Tenn.) 703; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Caldwell v. Bartlett*, 3 Duer (N. Y.) 341; *Jarvis v. Rogers*, 13 Mass. 105; *Wood v. Yeatman*, 15 B. Mon. (Ky.) 270; *Parker v. Patrick*, 5 Term R. 175; *White v. Garden*, 10 C. B. 919.

\* Story, Bailm. § 297.

<sup>83</sup> *Wilson v. Little*, 2 N. Y. 443. But a chose in action growing out of a personal tort is not assignable, and therefore cannot be pledged. *Pindell v. Grooms*, 18 B. Mon. (Ky.) 501.

<sup>84</sup> Story, Bailm. § 293.

<sup>85</sup> Rev. St. U. S. 1878, § 1291.

by the United States is of any validity.<sup>86</sup> National banks were prohibited by the currency act of June 3, 1864, from making loans on their own stock deposited as security, unless necessary to prevent loss on a debt previously contracted in good faith.<sup>87</sup>

The owner of chattels exempted from execution is not divested of the right of disposing of the property himself by pledge in security for the payment of his debts. In such case the owner clearly waives the benefit of the exemption, so far as the incumbrance extends or is operative.<sup>88</sup>

#### *Future Property.*

The general rule is that property not in existence or not yet acquired cannot be pledged.<sup>89</sup> The attempt to pledge such property creates only contract rights, though the pledge may take effect when the property is acquired or comes into existence, provided the rights of third persons have not intervened.<sup>90</sup> But property which is potentially in existence, such as crops in the ground,<sup>91</sup> and wool to be raised from sheep which are owned, may be pledged. Thus, a man may pledge all the wool that he may take from his flocks in a certain year, but not all the wool that shall grow upon sheep that he may thereafter buy.<sup>92</sup>

#### *Incorporeal Property.*

Incorporeal property may also be the subject of a pledge, and in fact the more important transactions in pledge have to do with this class of property. By "incorporeal property" is meant a debt or property evidenced by negotiable instruments,<sup>93</sup> such as bills of ex-

<sup>86</sup> Rev. St. U. S. § 4745.

<sup>87</sup> *Bank v. Lanier*, 11 Wall. 369.

<sup>88</sup> *Frost v. Shaw*, 3 Ohio St. 270; *Jones v. Scott*, 10 Kan. 33.

<sup>89</sup> *Gittings v. Nelson*, 86 Ill. 591; *Owens v. Kinsey*, 7 Jones (N. C.) 245; *Smithurst v. Edmunds*, 14 N. J. Eq. 408. For a pledge of an interest in a partnership not yet in existence, see *Collins' Appeal*, 107 Pa. St. 590.

<sup>90</sup> *Macomber v. Parker*, 14 Pick. (Mass.) 497; *Goodenow v. Dunn*, 21 Me. 86; *Smith v. Atkins*, 18 Vt. 461; *Ayers v. South Australian Banking Co., L. R. 3 P. C. 548*.

<sup>91</sup> *Smith v. Atkins*, 18 Vt. 461. But an attempt to pledge crops not yet planted is ineffectual against a landlord's lien. *Gittings v. Nelson*, 86 Ill. 591.

<sup>92</sup> *Smithurst v. Edmunds*, 14 N. J. Eq. 408.

<sup>93</sup> *Wilson v. Little*, 2 N. Y. 443, 447; *McLean v. Walker*, 10 Johns. (N. Y.)

change and promissory notes;<sup>94</sup> nonnegotiable instruments;<sup>95</sup> and quasi negotiable instruments, such as corporate stock,<sup>96</sup> bills of lading,<sup>97</sup> and warehouse receipts.<sup>98</sup> In Texas it is held that a land certificate issued by the state may be pledged,<sup>99</sup> but the rule is otherwise in Wisconsin.<sup>100</sup>

471; *White v. Phelps*, 14 Minn. 27; *Appleton v. Donaldson*, 3 Pa. St. 381; *Loomis v. Stave*, 72 Ill. 623; *Sanders v. Davis*, 13 B. Mon. (Ky.) 433; *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 667; *Fennell v. McGowan*, 58 Miss. 261; *Williamson v. Culpepper*, 16 Ala. 211; *State Bank v. Gaiennie*, 21 La. Ann. 555.

<sup>94</sup> A man may pledge his own note. *Green v. Sinker, Davis & Co.*, 135 Ind. 434, 35 N. E. 262. A promissory note of a third person, deposited by a debtor with his creditor as collateral security for a debt, is a pledge in which the pawnee has merely a special property, the general ownership remaining in the pawnor. *Garlick v. James*, 12 Johns. 146. Coupon bonds payable to the bearer may be pledged by the party issuing them, because they are securities usually sold in the stock market, and understood by the parties to be designed for that use, and not because the party's ordinary bond or mortgage, deposited as a collateral, could be so regarded. *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 667.

<sup>95</sup> *Cowdrey v. Vandemburgh*, 101 U. S. 572. And see *Blebinger v. Continental Bank*, 99 U. S. 143; *Wickham v. Morehouse*, 16 Fed. 324; *Judson v. Coccoran*, 17 How. (U. S.) 612; *Ingraham v. Disborough*, 47 N. Y. 421; *Chickering v. Fullerton*, 90 Ill. 520; *Irish v. Sharp*, 89 Ill. 26; *Storey v. Dutton*, 46 Mich. 539, 9 N. W. 844. In *Dewey v. Bowman*, 8 Cal. 145, an assignment of a lease was held a pledge rather than a mortgage.

<sup>96</sup> *Hasbrouck v. Vandervoort*, 4 Sandf. (N. Y.) 74; *Wilson v. Little*, 2 N. Y. 443; *Fisher v. Brown*, 104 Mass. 259; *Rozet v. McClellan*, 48 Ill. 345; *Heath v. Silverthorn Lead Mining & Smelting Co.*, 39 Wis. 147; *Conyngnam's Appeal*, 57 Pa. St. 474. It may be pledged by the corporation itself. *Brewster v. Hartley*, 37 Cal. 15. So insurance policies may be pledged. *Wells v. Archer*, 10 Serg. & R. (Pa.) 412; *Soule v. Union Bank*, 45 Barb. (N. Y.) 111; *Bruce v. Garden*, L. R. 5 Ch. 32; *Edwards v. Martin*, L. R. 1 Eq. 121; *Latham v. Chartered Bank of India*, L. R. 17 Eq. 205.

<sup>97</sup> *First Nat. Bank of Cincinnati v. Kelly*, 57 N. Y. 34; *Petitt v. First Nat. Bank of Memphis*, 4 Bush (Ky.) 334; *Mason v. Lickbarrow*, 1 H. Bl. 357.

<sup>98</sup> *Gibson v. Stevens*, 8 How. 384; *Yenni v. McNamee*, 45 N. Y. 614, 620.

<sup>99</sup> *Stone v. Brown*, 54 Tex. 330.

<sup>100</sup> But see *Smith v. Mariner*, 5 Wis. 551; *Whitney v. State Bank*, 7 Wis. 320; *Mowry v. Wood*, 12 Wis. 413.

*End Tues Jan 14th*

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## SAME—DELIVERY.

**31. Delivery is essential to the establishment of a pledge.**

The delivery may be:

(a) **Actual** (p. 121).

(b) **Constructive or symbolical** (p. 122).

**32. Delivery with intention to create a pledge is sufficient to establish a pledge of any kind of property.**

**EXCEPTION—**Except corporate stock (p. 126).

*Actual Delivery.*

The method of creating a pledge is by delivering the property to be pledged into the hands of the pledgee. This delivery is a necessary element in the creation of a pledge. Without it the pledge does not exist.<sup>101</sup> Between the immediate parties, the pledgor and pledgee, it is not material whether the pledge has been completed by delivery, or only a contract to make a pledge exists.<sup>102</sup> But, as against other persons, such as purchasers and creditors, who subsequently acquire rights in the property in good faith, the pledgee cannot claim the existence of a pledge, if there has been no delivery.<sup>103</sup> To constitute a valid pledge of part of a larger quantity of

<sup>101</sup> Fletcher v. Howard, 2 Aikens (Vt.) 115; Succession of Lanaux, 46 La. Ann. 1036, 15 South. 708; Cortelyou v. Lansing, 2 Caines, Cas. (N. Y.) 200; Barrow v. Paxton, 5 Johns. (N. Y.) 259, and note; Brown v. Bement, 8 Johns. (N. Y.) 97; Ceas v. Bramley, 18 Hun (N. Y.) 187; Campbell v. Parker, 9 Bosw. (N. Y.) 322, 329; Haskins v. Kelly, 1 Rob. (N. Y.) 160, 172; Milliman v. Neher, 20 Barb. (N. Y.) 37, 40; Muller v. Pondir, 6 Lans. (N. Y.) 472, 480; Nevan v. Roup, 8 Iowa, 207; Gleason v. Drew, 9 Me. 79, 82; Walcott v. Keith, 22 N. H. 196; Propst v. Roseman, 4 Jones (N. C.) 130; Corbett v. Underwood, 83 Ill. 324; Casey v. Cavaroc, 96 U. S. 467. Plaintiff leased a machine to defendant for certain work, under an agreement that plaintiff should receive one-fourth of the profits of the work, and pay one-fourth of the losses. Afterwards it was agreed that defendant should have a lien on the machine as security for plaintiff's agreement to pay one-fourth of the losses. It was then delivered to defendant. Held, that there was a pledge of the machine to defendant. Clark v. Costello, 79 Hun, 588, 29 N. Y. Supp. 937.

<sup>102</sup> Kelser v. Topping, 72 Ill. 226; Tuttle v. Robinson, 78 Ill. 332; City Fire Ins. Co. v. Olmsted, 33 Conn. 476.

<sup>103</sup> Collins' Appeal, 107 Pa. St. 590; Casey v. Cavaroc, 96 U. S. 467; Casey v. National Bank, Id. 492.

goods, the part to be pledged must be separated from the rest, and delivered.<sup>104</sup> An effective delivery, however, may be made by an agent of the pledgor,<sup>105</sup> and to an agent of the pledgee.<sup>106</sup> Even a clerk of the pledgor may hold the property for the pledgee. In such case the clerk has a special possession, distinct from his duties as clerk; and, to constitute such special possession, it is not necessary that the goods should be removed from the premises of the former owner. It is sufficient that they are so far in the custody of the special bailee that he can at all times have the legal control of them, and give notice of the lien to any purchaser or attaching creditor, and remove the goods, if such removal should be necessary for the safety of the pledgee.<sup>107</sup>

*Constructive or Symbolical Delivery.*

However, an actual delivery is not in all cases necessary for the creation of a pledge. Thus, when property is in the possession of a third person, an actual delivery to the pledgee will not be required.<sup>108</sup> For, the actual custody and possession of the goods being in the hands of the third person, a constructive delivery is sufficient to pass the property. An order by the pledgor upon the keeper, or, if the contract of pledge be in writing, proper and satisfactory notice thereof by the pledgee to the holder, constitutes such constructive delivery. Where goods are lying in a warehouse, although subject to a lien for keeping, notice to the warehouse keeper, where all the other requisites of a pledge are proved, is equivalent to a delivery. After such notice the keeper ceases to be the agent of the pledgor, and becomes the agent of the pledgee; and thus the goods are placed under the effective control of the pledgee, as much as they would be by an actual delivery.<sup>109</sup> The pledgee

<sup>104</sup> Collins v. Buck, 63 Me. 459.

<sup>105</sup> Cartwright v. Wilmerding, 24 N. Y. 521.

<sup>106</sup> City Bank of New Haven v. Perkins, 29 N. Y. 554; Johnson v. Smith, 11 Humph. (Tenn.) 396; McCready v. Haslock, 3 Tenn. Ch. 13; Brown v. Warren, 43 N. H. 430; Tibbetts v. Flanders, 18 N. H. 284; Boynton v. Payrow, 67 Me. 587; Weens v. Delta Moss Co., 33 La. Ann. 973.

<sup>107</sup> Summer v. Hamlet, 12 Pick. (Mass.) 76; Combs v. Tuchelt, 24 Minn. 423.

<sup>108</sup> Whitaker v. Sumner, 20 Pick. (Mass.) 399; Tuxworth v. Moore, 9 Pick. (Mass.) 347, 349.

<sup>109</sup> Whitaker v. Sumner, 20 Pick. (Mass.) 399, 403; Hathaway v. Haynes,



may himself be in possession at the beginning of the pledge, as where goods already pledged are, by agreement of the parties, made security for a further loan.<sup>110</sup> Or possession may be held by the pledgee jointly with others. Actual delivery is not necessary in such cases. It can make no difference, so long as the property is not in the hands of the pledgor, whether it be in the hands of the pledgee, or of a third person who has known and assented to the pledge, and who thus holds the property for the pledgee. Nor can it be material that the property be held by one alone, or by two jointly, provided they assent to hold the property for the pledgee; and they could as well and as properly thus jointly hold the property for one of their own number, who was the pledgee, as for a stranger.<sup>111</sup> Thus, there may be a pledge of property to a trustee, to pay his own debt first, and then the debts of several other creditors. This is a good pledge for all such creditors, and gives them all a lien upon the property.<sup>112</sup>

So there may be a symbolical delivery which will be sufficient to create a pledge: as, where goods are ponderous, and incapable of being handed over from one to another, there need not be an actual delivery,<sup>113</sup> but it may be done by what is tantamount, such as the

124 Mass. 311; *First Nat. Bank of Cincinnati v. Kelly*, 57 N. Y. 34; *Cartwright v. Wilmerding*, 24 N. Y. 521; *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 190; *Western Union R. Co. v. Wagner*, 65 Ill. 197; *Burton v. Curyea*, 40 Ill. 325; *Newcomb v. Cabell*, 10 Bush (Ky.) 460; *Whitney v. Tibbits*, 17 Wis. 369; *Dows v. National Exch. Bank*, 91 U. S. 618; *First Nat. Bank of Cincinnati v. Bates*, 1 Fed. 702; *Freiburg v. Dreyfus*, 135 U. S. 478, 10 Sup. Ct. 716; *Harris v. Bradley*, 2 Dill. (U. S.) 284, Fed. Cas. No. 6,116.

<sup>110</sup> *Van Blarcom v. Broadway Bank*, 37 N. Y. 540; *Brown v. Warren*, 43 N. H. 430.

<sup>111</sup> *Macomber v. Parker*, 14 Pick. (Mass.) 497; *Danforth v. Denny*, 25 N. H. 155.

<sup>112</sup> *Brown v. Warren*, 43 N. H. 430. A pledgee, who already holds property to secure his debt, may, by consent of the parties, become the pledgee for another creditor after the expiration of the contract made to secure his debt. *Herber v. Thompson*, 47 La. Ann. 800, 17 South. 318.

<sup>113</sup> *Jewett v. Warren*, 12 Mass. 300; *Whitney v. Tibbits*, 17 Wis. 369; *Nevan v. Roup*, 8 Iowa, 207; *Badlam v. Tucker*, 1 Pick. (Mass.) 389; *Summer v. Hamlet*, 12 Pick. (Mass.) 76; *Atkinson v. Maling*, 2 Term R. 462; *Barber v. Meyerstein*, L. R. 4 H. L. 317.

delivery of a key of a warehouse in which goods are lodged,<sup>114</sup> or by the delivery of other indicia of property.<sup>115</sup>

*Agreement to Deliver.*

A mere agreement to deliver property in pledge does not affect the rights of third persons subsequently attaching. An agreement to pledge gives no privilege.<sup>120</sup> Equity will not regard a thing as done which has not been done, when it would injure third parties, who have sustained detriment and acquired rights by what has been done.<sup>121</sup> No rights can be acquired as a pledgee, under such an agreement, until the delivery is actually made. The contract may give the intended pledgee a right to enforce delivery, but this right cannot be exercised to the detriment of third persons.<sup>122</sup> An agreement to deliver property in pledge may be performed by a delivery at a subsequent time, and thus validate the pledge, provided, as in other cases, there are no intervening rights which would be affected.<sup>123</sup>

*Incorporeal Property.*

A pledge of incorporeal property is made by delivery, just as in other cases,—that is, the delivery of the evidence or symbol creates a pledge of the property,—and such a delivery is necessary.<sup>124</sup> Though a pledge of this kind of property is generally made by an assignment in writing, such an assignment is not absolutely necessary, except in the case of stocks, mentioned later. Thus, a negotiable instrument may be pledged by a simple delivery, without any indorsement,

<sup>114</sup> Wilkes v. Ferris, 5 Johns. (N. Y.) 335; Chaplin v. Rogers, 1 East, 192, 195; Ryall v. Rolle, 1 Atk. 164, 170.

<sup>115</sup> Chaplin v. Rogers, 1 East, 192, 195; Hodgson v. Le Bret, 1 Camp. 233, 236.

<sup>120</sup> Casey v. National Bank, 96 U. S. 492, 493; Gale v. Ward, 14 Mass. 352, 356; Tucker v. Buffington, 15 Mass. 477, 480; Collins v. Buck, 63 Me. 459, 461; Caffin v. Kirwan, 7 La. Ann. 221; Nisbit v. Macon Bank & Trust Co., 12 Fed. 686.

<sup>121</sup> Nisbit v. Macon Bank & Trust Co., 12 Fed. 686, 690; Casey v. Cavaroc, 96 U. S. 467, 491.

<sup>122</sup> City Fire Ins. Co. v. Olmsted, 33 Conn. 476.

<sup>123</sup> Parshall v. Eggert, 54 N. Y. 18.

<sup>124</sup> Jones, Pledges, § 80; Casey v. Cavaroc, 96 U. S. 467; Casey v. National Bank, Id. 492; Casey v. Schuchardt, Id. 494.

even though it be payable "to order."<sup>125</sup> And it has long been settled that if a nonnegotiable note is transferred by delivery, bona fide and for a valuable consideration, this is a valid pledge, which the courts of law will regard and protect, although the pledgee cannot maintain an action at law thereon in his own name. And the same principle applies to other choses in action.<sup>126</sup> An equitable interest in a judgment may be pledged by the delivery of the execution thereon to the pledgee.<sup>127</sup> Where there is a pledge of a nonnegotiable chose in action, no notice to the debtor is necessary to the validity of the pledge.<sup>128</sup>

The rule in England would seem to be that, as between successive purchasers of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent purchaser.<sup>129</sup> Such, however, has not been the rule adopted in this country, where it is held that the assignment of a chose in action is complete upon the mutual assent of the assignor and assignee, and does not gain additional validity, as against third persons, by notice to the debtor.<sup>130</sup>

Applying the rules of the preceding paragraphs to some special cases, we find that a delivery of a savings-bank book, with the intention of transferring the title to the money deposited, transfers the equitable title to the deposit,<sup>131</sup> and the book may be delivered with the intention that it should be held as collateral security in the same manner.<sup>132</sup> So the delivery of a note and mortgage as security for a debt, without an assignment in writing, is to be considered as an equitable assignment, which is entitled to protection in a court of

<sup>125</sup> *Van Riper v. Baldwin*, 19 Hun (N. Y.) 344; *Morris v. Preston*, 93 Ill. 215; *Tucker v. New Hampshire Savings Bank* in Concord, 58 N. H. 83.

<sup>126</sup> *Jones v. Witter*, 13 Mass. 304, 307; *Grover v. Grover*, 24 Pick. (Mass.) 261, 263; *Norton v. Piscataqua Fire & Marine Ins. Co.*, 111 Mass. 532, 535; *Kingman v. Perkins*, 105 Mass. 111; *Dix v. Cobb*, 4 Mass. 508; *Williams v. Ingersoll*, 89 N. Y. 508, 518; *Stout v. Yaeger Milling Co.*, 13 Fed. 802.

<sup>127</sup> *Crain v. Paine*, 4 Cush. (Mass.) 483, 485; *Dunn v. Snell*, 15 Mass. 481; *Thayer v. Daniels*, 113 Mass. 129.

<sup>128</sup> *Jones*, Pledges, § 136; *Thayer v. Daniels*, 113 Mass. 129.

<sup>129</sup> *Dearle v. Hall*, 3 Russ. 3; *Loveridge v. Cooper*, 3 Russ. 32; *Meux v. Bell*, 1 Hare, 73; *Foster v. Blackstone*, 1 Mylne & K. 298.

<sup>130</sup> *Thayer v. Daniels*, 113 Mass. 129.

<sup>131</sup> *Pierce v. Boston Five-Cents Savings Bank*, 129 Mass. 423.

<sup>132</sup> *Taft v. Bowker*, 132 Mass. 277.

law;<sup>183</sup> and where the directors of a corporation placed the company's policies of insurance in the hands of two of its directors, without any formal assignment, to secure loans made and to be made by such directors and others to the corporation, it was held that there was a sufficient delivery to sustain the pledge.<sup>184</sup>

### *Corporate Stock.*

What is necessary to constitute a valid pledge of stock in an incorporated company has been the subject of much discussion and learning, with resulting conflicting decisions; but, although formerly there was doubt whether it could be the subject of a pledge at all, there is no doubt, in the absence of statutory provisions, that, to pledge stock, some written transfer or contract is necessary, as against third parties. Mere handing over the certificate is not sufficient.<sup>185</sup> There must be a transfer on the books of the company, or a power of attorney authorizing a transfer,<sup>186</sup> or some assignment or contract in writing by which the holder may assert title and compel a transfer when desired.<sup>187</sup> The pledge is in these cases effected by a transfer of the certificates, rather than of the stock itself. It is usually provided by statute, or by a by-law of the corporation, that no transfer of stock is valid unless made on the books of the company. The entry of the transaction on the books, where stock is sold or pledged, is required, not for the transfer of the title, but for the protection of the parties and others dealing with the company, and to enable it to know who are its stockholders, entitled to vote at

<sup>183</sup> *Crain v. Paine*, 4 Cush. (Mass.) 483.

<sup>184</sup> *Stout v. Yaeger Milling Co.*, 13 Fed. 802.

<sup>185</sup> *Wagner v. Marple* (Tex. Civ. App.) 31 S. W. 691.

<sup>186</sup> A pledge of stock by a transfer in blank on the back of the certificate, which is pinned to the note secured, is valid in respect to form. *McClintock v. Central Bank*, 120 Mo. 127, 24 S. W. 1052.

<sup>187</sup> *Nisbit v. Bank & Trust Co.*, 12 Fed. 686. And see article on Law of Collateral Security, by Leonard A. Jones, in 14 Am. Law Rev. (Feb., 1880) 97, 128. A broker carrying stocks upon margins is a pledgee. The purchaser is regarded as pledgor of the stock which the broker holds as a pledge for the advances made by him in purchasing the stock. *Baker v. Drake*, 66 N. Y. 518; *Stentom v. Jerome*, 54 N. Y. 480; *Vaupell v. Woodward*, 2 Sandf. Ch. (N. Y.) 143; *McNell v. Tenth Nat. Bank of New York*, 55 Barb. (N. Y.) 59; *Thompson v. Toland*, 48 Cal. 99; *Worthington v. Tormey*, 34 Md. 182; *Hatch v. Douglas*, 48 Conn. 116.

their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps, also, to protect the pledgee against proceedings of the seller's creditors. Purchasers and creditors, in the absence of other knowledge, are only bound to look to the books of registry of the company.<sup>138</sup> But, as between the parties to a pledge, it is enough that the certificate is delivered with authority to the pledgee, or any one he may name, to transfer it on the books of the company.<sup>139</sup> If a subsequent transfer of the certificate be refused by the company, it can be compelled, at the instance of either of them.<sup>140</sup>

### *Bill of Lading.*

A bill of lading may be pledged by a mere delivery without indorsement.<sup>141</sup> It is well settled that where a party consigns goods to another, and thereupon draws upon the consignee for funds, accompanying the draft with the delivery of the bill of lading or shipping receipt, as collateral security for its payment, the acceptance and payment, by the consignee, of the draft, accompanied with the bill of lading or shipping receipt, vests in him a special property in the goods. The bill of lading, in such case, is a symbol of the goods, and the delivery thereof, with the intention to transfer the property in the goods, is a symbolical delivery of the goods.

### *Warehouse Receipts.*

The delivery of a warehouse receipt is a sufficient pledge of it.<sup>142</sup> This is true, although the receipt is not made out "to bearer." The

<sup>138</sup> Bank v. Lanier, 11 Wall. 369.

<sup>139</sup> Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770; Gilbert v. Manchester Iron Manuf'g Co., 11 Wend. (N. Y.) 627; Commercial Bank of Buffalo v. Kortright, 22 Wend. (N. Y.) 362; Johnston v. Laflin, 103 U. S. 800; Cornick v. Richards, 3 Lea (Tenn.) 1.

<sup>140</sup> Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90; Webster v. Upton, 91 U. S. 65; Commercial Bank of Buffalo v. Kortright, 22 Wend. (N. Y.) 362.

<sup>141</sup> Gibson v. Stevens, 8 How. (U. S.) 383; First Nat. Bank of Calro v. Crocker, 111 Mass. 163, 167; First Nat. Bank of Green Bay v. Dearborn, 115 Mass. 219; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Halle v. Smith, Bos. & P. 563; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 173; Grosvenor v. Phillips, 2 Hill (N. Y.) 147; Bank of Rochester v. Jones, 4 N. Y. 497; Gibson v. Stevens, 8 How. 383; Allen v. Williams, 12 Pick. (Mass.) 297; Peters v. Elliott, 78 Ill. 321.

<sup>142</sup> Rice v. Cutler, 17 Wls. 351.



delivery of the receipt is as effectual as the delivery of the goods represented, and it makes no difference that the receipt is not indorsed by the pledgor.<sup>143</sup> A debtor cannot pledge property of which he retains possession by giving receipts for it, and agreeing to hold it, as a warehouseman, for the pledgee.<sup>144</sup> By statute, however, in a few states, a pledgor may be warehouse keeper for his pledgee.<sup>145</sup>

#### RIGHTS AND LIABILITIES—OF PLEDGOR.

**33.** Unless varied by a special contract, the principal rights and liabilities of a pledgor are as follows:

- (a) He impliedly warrants his title (p. 128).
- (b) His interest is assignable (p. 129).
- (c) By statute, in many states, his interest is subject to judicial sale, but not at common law (p. 130).
- (d) He can sue third persons for injuries to the pledge (p. 131).
- (e) He has a right to redeem, which continues until foreclosed (p. 132).

The rights and liabilities of the parties to a contract of pledge may be varied, as in other bailments, by a special contract containing such terms as they see fit to insert.<sup>146</sup> In the absence of such agreements, the law annexes certain conditions to a pledge, which govern the relations of the pledgor and pledgee to each other and to third persons.

##### *Warranty of Title by Pledgor.*

A pledgor, by delivering property in pledge, impliedly warrants his title thereto as that of an absolute owner.<sup>147</sup> He is accordingly lia-

<sup>143</sup> *Gibson v. Stevens*, 8 How. 383; *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335; *Hoor v. Barker*, 8 Cal. 609; *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399.

<sup>144</sup> *Parshall v. Eggart*, 52 Barb. (N. Y.) 367; *Id.*, 54 N. Y. 18; *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Geddes v. Bennett*, 6 La. Ann. 516.

<sup>145</sup> *Nebraska, Laws 1879*, p. 73, § 1; *Comp. St. 1881*, c. 92, § 13. *Kentucky, Act March 6, 1869.*

<sup>146</sup> *St. Losky v. Davidson*, 6 Cal. 643; *Lee v. Baldwin*, 10 Ga. 208; *Lawrence v. McCalmont*, 2 How. 425, 451; *Drake v. White*, 117 Mass. 10. See ante, p. 10.

<sup>147</sup> *Mairs v. Taylor*, 40 Pa. St. 446; *Goldstein v. Hort*, 30 Cal. 372.

ble to the pledgee for the amount of any liens or incumbrances on the property which the pledgee is obliged to discharge to perfect his title.<sup>148</sup> The pledgor may, however, avoid such liability, where he is less than absolute owner, by giving the pledgee notice of the qualified nature of his title.

One assuming to own personal property, and pledging it, is estopped from afterwards asserting that he did not own it when he pledged it; and a subsequent acquisition of title by the pledgor, as between the parties to the contract, inures to the benefit of the pledgee, without any new delivery or ratification of the pledge.<sup>149</sup>

### *Assignment by Pledgor.*

The pledgor of a chattel still retains his property in it, though qualified by the right existing in the pawnee, and has a right to sell it, and by the sale to transfer that property to the buyer;<sup>150</sup> and if the pawnee, on the buyer's tendering him the amount due, refuses to deliver it up, the buyer may maintain trover to recover it.<sup>151</sup> The pledgor's assignee takes the property subject to the rights of the pledgee,<sup>152</sup> and may even become liable for the payment of the debt secured.<sup>153</sup> After the pledgee has received notice of an assignment of the pledgor's interest, he holds for the assignee, and cannot lawfully surrender the pledge to the pledgor, even on payment of the

<sup>148</sup> Cass v. Higenbotam, 27 Hun (N. Y.) 406.

<sup>149</sup> Goldstein v. Hort, 30 Cal. 372.

<sup>150</sup> Fletcher v. Howard, 2 Aiken (Vt.) 115; Bush v. Lyon, 9 Cow. (N. Y.) 52; Whitaker v. Sumner, 20 Pick. (Mass.) 399; Tuxworth v. Moore, 9 Pick. (Mass.) 347; Pettyplace v. Dutch, 13 Pick. (Mass.) 388; Cooper v. Ray, 47 Ill. 53; Ratcliff v. Vance, 2 Const. (S. C.) 239.

<sup>151</sup> Franklin v. Neate, 13 Mees. & W. 480; Ratcliff v. Vance, 2 Const. (S. C.) 239. Refusal to deliver pledged stock to the pledgor's assignee is not justified by its attachment under a writ against such pledgor, subsequent to such assignment. Loughborough v. McNevin, 74 Cal. 250, 14 Pac. 369, and 15 Pac. 773.

<sup>152</sup> Taggart v. Packard, 39 Vt. 628, 631.

<sup>153</sup> Thus, one who purchased from the general owner goods pledged for advances, with knowledge or notice of the lien of the pledgee, and who receives the goods from the latter with notice of his claim of a lien thereon for a specific amount, takes them with the obligation to pay the lien, and, in an action therefor, cannot offset a claim against the pledgor. Carrington v. Ward, 71 N. Y. 360.

amount secured.<sup>154</sup> If, on default, the pledgee sells the property, he holds the surplus proceeds, after the satisfaction of the debt, for the assignee.<sup>155</sup>

*Sale of Pledgor's Interest on Judicial Process.*

At common law, the interest remaining in a pledgor of property is not subject to attachment<sup>156</sup> or garnishment,<sup>157</sup> nor to seizure and sale on execution.<sup>158</sup> This rule has been changed by statute in many states. In some this result is brought about by express enactments<sup>159</sup> which provide that the pledgor's interest shall be liable to some or all the forms of judicial sale, or the terms of the statutes are so broad that they include the interest of a pledgor by implication.<sup>160</sup> But these statutes do not permit the creditor to

<sup>154</sup> Duell v. Cudlipp, 1 Hilt. (N. Y.) 166.

<sup>155</sup> Van Blarcom v. Broadway Bank, 37 N. Y. 540.

<sup>156</sup> Badlam v. Tucker, 1 Pick. (Mass.) 389; Jennings v. McIlroy, 46 Ark. 236; Tannahill v. Tuttle, 3 Mich. 104; Wilkes v. Ferris, 5 Johns. (N. Y.) 336; Marsh v. Lawrence, 4 Cow. (N. Y.) 461; Stief v. Hart, 1 N. Y. 20, 28; Pomeroy v. Smith, 17 Pick. (Mass.) 85; Hunt v. Holton, 13 Pick. (Mass.) 216; Srodes v. Caven, 3 Watts (Pa.) 258. Where a sheriff violates the law, in seizing goods pledged, under an attachment against the pledgor, in an action against him by the pledgee he will be liable to the latter for the entire value of the goods. Treadwell v. Davis, 34 Cal. 601.

<sup>157</sup> Hall v. Page, 4 Ga. 428; Winslow v. Fletcher, 53 Conn. 390, 4 Atl. 250; Roby v. Labuzan, 21 Ala. 60; Kergin v. Dawson, 1 Gilman (Ill.) 86; Patterson v. Harland, 12 Ark. 158.

<sup>158</sup> Soule v. White, 14 Me. 436; Thompson v. Stevens, 10 Me. 27; Briggs v. Walker, 21 N. H. 72; Dowler v. Cushwa, 27 Md. 354, 366; Badlam v. Tucker, 1 Pick. (Mass.) 389; Treadwell v. Davis, 34 Cal. 601.

<sup>159</sup> Colorado, Sess. Laws 1879, p. 82, §§ 17, 18. Georgia, Code 1873, § 2144. Indiana, 2 Rev. St. 1876, p. 207, § 436; 1 Rev. St. 1894, § 734. Maine, Rev. St. 1871, c. 81, §§ 41, 44. Massachusetts, Pub. St. 1882, c. 161, §§ 74-78. Michigan, 2 Comp. Laws, 1871, § 6097. Minnesota, Gen. St. 1878, c. 66, § 309; Gen. St. 1894, § 5458. New Hampshire, Gen. Laws 1878, c. 224, §§ 17, 18; Id., c. 236, §§ 3-5. New York, 4 Rev. St. 1892 (Code Civ. Proc.) § 1412. Texas, Rev. St. 1879, p. 336, art. 2296. Vermont, Laws 1880, No. 33, § 1; Rev. Laws 1880, §§ 1180-1185. Wisconsin, Rev. St. 1878, c. 130, § 2988.

<sup>160</sup> Petty v. Overall, 42 Ala. 145; Code Civ. Proc. §§ 545, 688; Treadwell v. Davis, 34 Cal. 601; Louisiana, Civ. Code, art. 3157; Augé v. Variol, 31 La. Ann. 865; Horner v. Dennis, 34 La. Ann. 389; Mechanics' Building & Loan Ass'n of New Brunswick v. Conover, 14 N. J. Eq. 219; Reichenbach v. McKean, 95 Pa. St. 432; Srodes v. Caven, 3 Watts (Pa.) 258; Baugh v. Kirk-

divest the interest of the pledgee. For he has a special property in the pledge, and is not bound to deliver it up until his incumbrance is discharged. And a creditor cannot, in this respect, have greater rights than the pledgor himself.<sup>161</sup>

*Action by Pledgor against Third Persons.*

As to the pledgor's right to sue third persons for injury to the pledged property, Mr. Schouler<sup>162</sup> says: "The extent of the pledgor's right to sue strangers for wrongfully taking or injuring the pledge has not been fully determined; but while it may be theoretically true that either the party having the special property, or the general owner, may recover full damages against an intermeddler, courts obviously incline, in practice, to prefer the pledgee, that the pledgor, whose principal debt remains unpaid, or principal engagement unfulfilled, may not oust him of his security." An assignee of the pledgor stands in the same position as the pledgor himself, and can sue third persons for injuries to the pledged property, if the pledgor could.<sup>163</sup> But no action can be maintained by an assignee of a pledgor for a conversion prior to such assignment, when the assignment under which he claims purports to transfer the property only, and not the right of action.<sup>164</sup> And, when the transfer or assignment is made to the plaintiff after the property has passed out of the pledgee's possession, a demand of it by the assignee from the

patrick, 54 Pa. St. 84; *First Nat. Bank of Memphis v. Pettit*, 9 Helsk. (Tenn.) 447; *National Bank of Pulaski v. Winston*, 5 Baxt. (Tenn.) 685. A purchaser of stock at execution sale, under an attachment against the original pledgor, acquires it subject to the pledge. *McClintock v. Central Bank*, 120 Mo. 127, 24 S. W. 1052. Where stock pledged as collateral is levied on and sold under process, the purchaser cannot be deprived of his rights under the levy by any arrangement between the pledgor and pledgee thereafter made. *Id.*

<sup>161</sup> *Briggs v. Walker*, 21 N. H. 72, 77. Where the sheriff levies an attachment on, and sells, personal property pledged to a third person to secure a debt which equals the value of such property, the pledgee is entitled to recover of the sheriff and the attachment creditors the value of such property, less prior liens thereon, and is not limited to the amount it sold for, less such liens. *Grabfelder v. Lockett* (Tex. Civ. App.) 26 S. W. 168.

<sup>162</sup> Bailm. 204.

<sup>163</sup> *Dupré v. Fall*, 10 Cal. 430; *Kent v. Westbrook*, 1 Ves. Sr. 278; *Franklin v. Neate*, 13 Mees. & W. 481.

<sup>164</sup> *McKee v. Judd*, 12 N. Y. 622.

pledgee, and a refusal on his part to give it up, because he had actually parted with its possession to the person from whom he received it, does not constitute a conversion.<sup>165</sup>

*Pledgor's Right to Redeem.*

The pledgor has a right to redeem the pledged property by payment of the debt,<sup>166</sup> or performance of the engagement secured. This right continues until it is foreclosed by a sale in one of the methods to be subsequently discussed.<sup>167</sup>

Where the pledgee remains in possession of the pledge, the statute of limitations does not ordinarily begin to run against the pledgor until tender of the debt for which the pledge was given, and a refusal by the pledgee to restore the pledge upon demand by the pledgor, for until then he has no cause of action.<sup>168</sup> And mere delay on the part of the pledgor to claim a redemption of the pledge, though for the period prescribed by the statute of limitations as a bar to an action on the debt for which the pledge was held, will not suffice to cut off the right of the pledgor to redeem,<sup>169</sup> unless the case is included within the terms of the statute of limita-

<sup>165</sup> Duell v. Cudlipp, 1 Hilt. (N. Y.) 166; Id., 52 N. Y. 18.

<sup>166</sup> Roberts v. Sykes, 30 Barb. (N. Y.) 172. When no time for redemption is fixed, the pledgor may redeem at any time. Cortelyou v. Lansing, 2 Caines, Cas. (N. Y.) 200, 204. In an action in equity to redeem a pledge, payment of the amount for which the pledge was given should be directed before the return of the pledge is ordered. Smith v. Anderson (Tex. Civ. App.) 27 S. W. 775. And see, further, as to redemption in equity, Bartlett v. Johnson, 9 Allen (Mass.) 530; Conyngham's Appeal, 57 Pa. St. 474; Brown v. Runals, 14 Wis. 755; Chapman's Adm'r v. Turner, 1 Call (Va.) 280, 288; Flowers v. Sproule, 2 A. K. Marsh. (Ky.) 54; Merrill v. Houghton, 51 N. H. 61; White Mountain R. Co. v. Bay State Iron Co., 50 N. H. 57; Hasbrouck v. Vandervoort, 4 Sandf. (N. Y.) 74; Jones v. Smith, 2 Ves. Jr. 372.

<sup>167</sup> Post, p. 170.

<sup>168</sup> Whelan's Ex'r v. Kinsley's Adm'r, 26 Ohio St. 131; Jones v. Thurmond's Heirs, 5 Tex. 318; Cross v. Eureka L. & Y. Canal Co., 73 Cal. 302, 14 Pac. 885.

<sup>169</sup> Whelan's Ex'r v. Kinsley's Adm'r, 26 Ohio St. 131; Hancock v. Franklin Ins. Co., 114 Mass. 155; Moses v. St. Paul, 67 Ala. 168; Kemp v. Westbrook, 1 Ves. Sr. 278. Where an article pledged is a specific chattel, there is an ample remedy at law, by replevin, if the pledgee retains the possession, or by trover or assumpsit in case he has parted with it. Bryson v. Rayner, 25 Md. 424.



tions.<sup>170</sup> On the other hand, the fact that the debt secured is barred does not entitle the pledgor to recover the pledge without paying the debt, for the obligation to pay still continues, though the remedy is barred.<sup>171</sup>

A clause inserted in the original contract, providing that, if the terms of the contract are not strictly fulfilled at the time and in the mode prescribed, the pledge shall be irredeemable, is void, upon the ground of public policy, as tending to the oppression of debtors.<sup>172</sup> The Roman law treated a similar stipulation (called in that law "lex commissoria") in the same manner, holding it to be a mere nullity. However, the Roman law allowed the parties to agree that upon default in payment the creditor might take the pledge at a stipulated price, provided it was its reasonable value, and the transaction was bona fide.<sup>173</sup>

#### SAME—OF PLEDGEE BEFORE DEFAULT.

34. The principal rights and liabilities of a pledgee, before default of the pledgor, are as follows:

- (a) His interest is assignable (p. 134).
- (b) He acquires the title which the pledgor has, and no greater (p. 135).

**EXCEPTION**—But he holds free from equities:

- (1) When he takes negotiable securities without notice (p. 135).
- (2) When the pledgor has been clothed by the owner with the indicia of ownership (p. 135).
- (c) He acquires a special property, including a right to possession of the pledge, and to maintain suits for injuries to it (p. 150).
- (d) He has no right to use the pledge (p. 151).

<sup>170</sup> Roberts v. Sykes, 30 Barb. (N. Y.) 173.

<sup>171</sup> Jones v. Merchants' Bank of Albany, 6 Rob. (N. Y.) 162; In re Oakley, 2 Edw. Ch. (N. Y.) 478.

<sup>172</sup> Vickers v. Battershall, 84 Hun, 496, 32 N. Y. Supp. 314; Lucketts v. Townsend, 8 Tex. 119. But the pledgor's right to redeem may be released by a subsequent contract. Beatty v. Sylvester, 3 Nev. 228.

<sup>173</sup> Story, Bailm. § 345.

- (e) He can hold the profits and increase of the pledge, but must account therefor (p. 152).
- (f) He may charge the pledgor with expenses incurred about the pledge (p. 154).
- (g) He must use ordinary care and diligence (p. 155).
- (h) He must, on redemption by the pledgor, redeliver the identical property pledged, except in case of certificates of stock (p. 158).

*Pledgee's Interest Assignable.*

The interest which a pledgee acquires is transferable. He may assign all his interest in the pledge,<sup>174</sup> or he may assign it conditionally, to secure payment of his own debt; that is, he may subpledge it,<sup>175</sup> or he may deliver it to a bailee to hold for him.<sup>176</sup> The transfer of the pledge in any one of these ways would be a legal disposition of it, authorized by the nature of the pledgee's interest.<sup>177</sup> But a purchaser or assignee acquires only the rights of the pledgee,<sup>178</sup> except in some special cases, to be noticed hereafter.\*

<sup>174</sup> *Jarvis v. Rogers*, 15 Mass. 389, 408; *Whitaker v. Sumner*, 20 Pick. (Mass.) 399; *Bush v. Lyon*, 9 Cow. (N. Y.) 52; *Ferguson v. Union Furnace Co.*, 9 Wend. (N. Y.) 345; *Thompson v. Patrick*, 4 Watts (Pa.) 414; *Ashton's Appeal*, 73 Pa. St. 153; *Goss v. Emerson*, 23 N. H. 38; *Bailey v. Colby*, 34 N. H. 29; *Warner v. Martin*, 11 How. 209; *Calkins v. Lockwood*, 17 Conn. 154; *Belden v. Perkins*, 78 Ill. 449; *Bradley v. Parks*, 83 Ill. 169. The consent of the pledgor to the assignment is not necessary. *Curtis v. Leavitt*, 15 N. Y. 9. A pledgee of negotiable instruments may assign them. *Chapman v. Brooks*, 81 N. Y. 75; *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190; *Id.*, 88 N. Y. 1; *Baldwin v. Ely*, 9 How. 580, 599; *Merchants' Bank v. State Bank*, 10 Wall. 604.

<sup>175</sup> *Lewis v. Mott*, 36 N. Y. 395; *Jarvis v. Rogers*, 15 Mass. 389; *National Bank of Pulaski v. Winston*, 5 Baxt. (Tenn.) 685; *McComble v. Davies*, 7 East, 5, 7. One to whom securities have been pledged to secure the payment of a note may, on negotiating the note, transfer the securities, without being liable to a suit for conversion by the pledgor. *Waddle v. Owen*, 43 Neb. 489, 61 N. W. 731.

<sup>176</sup> *Ingersoll v. Van Bokkellin*, 7 Cow. (N. Y.) 670.

<sup>177</sup> *Goss v. Emerson*, 23 N. H. 38.

<sup>178</sup> *Norton v. Baxter*, 41 Minn. 146, 42 N. W. 865; *Luckett v. Townsend*, 8 Tex. 119, 132.

\* See post, pp. 143, 144.

*Title Acquired by Pledgee.*

When a valid pledge of corporeal property is created, the pledgee acquires rights which the pledgor and those in privity with him cannot dispute.<sup>179</sup> As to third persons the pledgee's title is the same as that of the pledgor.<sup>180</sup> If the pledgor had a title good against all the world, the pledgee acquires the same rights. If the pledgor's title was defective, the pledgee holds the pledged property, subject to the same liability to the title being divested. By a pledge of property, the pledgee acquires no better rights than the pledgor had.<sup>181</sup> But there is an exception to this rule in the case of a pledge of negotiable instruments, and where the owner of property has clothed another with the indicia of title.<sup>182</sup> In such case a pledgee in good faith can hold the property against the real owner, as was seen in discussing pledges by factors, and similar cases.<sup>183</sup>

*Same—Negotiable Instruments.*

When a person takes negotiable paper before maturity, in the usual course of business, as collateral security, and makes advances at the time upon the credit of such paper, he is considered by all the authorities as a bona fide holder for value, within the rule for the protection of holders of commercial paper.<sup>184</sup> The indorsement and deliv-

<sup>179</sup> Goldstein v. Hort, 30 Cal. 372.

<sup>180</sup> Duell v. Cudlipp, 1 Hilt. (N. Y.) 166; Taylor v. Turner, 87 Ill. 296; Agnew v. Johnson, 22 Pa. St. 471; Hooper v. Ramsbottom, 4 Camp. 121; Gottlieb v. Hartman, 3 Colo. 53; Hartop v. Hoare, 3 Atk. 44.

<sup>181</sup> Swett v. Brown, 5 Pick. (Mass.) 178; Reeves v. Smith, 1 La. Ann. 379; Agnew v. Johnson, 22 Pa. St. 471; Gallaher v. Cohen, 1 Brown (Pa.) 43.

<sup>182</sup> The title, legal or equitable, by which a collateral security is held, depends, not on the title to the principal obligation, but on the method of transfer. Thomson-Houston Electric Co. v. Capitol Electric Co., 12 C. C. A. 643, 65 F. 341.

<sup>183</sup> See ante, p. 114.

<sup>184</sup> Swift v. Tyson, 16 Pet. 1; Best v. Crall, 23 Kan. 342, 345; Bell v. Bell, 12 Pa. St. 235; Bowman v. Van Kuren, 29 Wis. 209, 219; Curtis v. Mohr, 18 Wis. 615; Bond v. Wiltse, 12 Wis. 611; Jenkins v. Schaub, 14 Wis. 1; Kinney v. Kruse, 28 Wis. 183; Dix v. Tully, 14 La. Ann. 456; Warner v. Fourth Nat. Bank, 115 N. Y. 251, 22 N. E. 172; Nelson v. Eaton, 26 N. Y. 410, 416; Exchange Bank v. Butner, 60 Ga. 654; Grisword v. Davis, 31 Vt. 390; Worcester Nat. Bank v. Cheeney, 87 Ill. 602. One who receives, as collateral security to a loan then made, negotiable bonds not yet matured, without knowledge of any defense to such bonds, is entitled to protection, as a purchaser thereof, to

ery, under such circumstances, transfer to the pledgee the title to the instrument, and give him an original and paramount right of action upon it against the previous parties, so that he is not affected by the equities existing between them.<sup>185</sup> It is, of course, an obvious and necessary consequence of these decisions that, by the negotiation and transfer of a note, under such circumstances, the pledgee acquires a perfect title to the instrument, and has his right of action upon it against the previous parties.<sup>186</sup> Otherwise, he would not be protected, and the instrument, in his hands, would not be discharged of all equitable and legal defenses to which it may have been subject before it came to him.<sup>187</sup>

As to whether a pledgee who takes negotiable instruments as security for a pre-existing debt is a bona fide holder, the cases are, on some points, in conflict. On this question, Mr. Norton<sup>188</sup> says:

“‘Antecedent indebtedness’ means a debt already existing at the time of the execution of a contract, whatever it may be. Such, for example, are a note for which a renewal note is given, or a debt created in buying goods, for which, at the expiration of the terms of credit for which the goods were sold, a note is given in extension. The importance of the doctrine relates, almost always, to the question whether the purchaser of the paper is a holder for value or not. If he is to be treated as a holder for value, then the defenses in favor of prior parties are ruled out. If not, then any prior party

the extent of the amount of such loan. *Hayden v. Lincoln City Electric Ry. Co.*, 43 Neb. 680, 62 N. W. 73.

<sup>185</sup> *Vallaire v. Hartshorne*, 21 N. J. Law, 665; *Youngs v. Lee*, 12 N. Y. 551; *First Nat. Bank v. Fowler*, 36 Ohio St. 524; *Zellweger v. Caffé*, 5 Duer (N. Y.) 87, 91; *Farwell v. Importers' & Traders' Nat. Bank*, 16 Wkly. Dig. (N. Y.) 20; *Fisher v. Fisher*, 98 Mass. 303; *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Draper v. Saxton*, 118 Mass. 427; *Buchanan v. International Bank*, 78 Ill. 500, 504; *Stotts v. Byers*, 17 Iowa, 303; *Crosby v. Roub*, 16 Wis. 616.

<sup>186</sup> *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190; *Richardson v. Crandall*, 48 N. Y. 348, 364; *Bank of New York v. Vanderhorst*, 32 N. Y. 553; *Miller v. Pollock*, 99 Pa. St. 202; *Munn v. McDonald*, 10 Watts (Pa.) 270; *Stotts v. Byers*, 17 Iowa, 303; *Crosby v. Roub*, 16 Wis. 616; *Lyon v. Ewings*, 17 Wis. 61; *Bowman v. Van Kuren*, 29 Wis. 209, 219; *Hotchkiss v. National Banks*, 21 Wall. 354; *Tiffany v. Boatman's Inst.*, 18 Wall. 375; *Michigan Bank v. Eldred*, 9 Wall. 544.

<sup>187</sup> *Curtis v. Mohr*, 18 Wis. 615.

<sup>188</sup> *Bills & Notes* (2d Ed.) 294.

may raise such defenses as he has against the person who has taken the instrument without notice, but in consideration of the alleged antecedent indebtedness.

"The wisest theory, all things being considered, is the doctrine of Judge Story.<sup>189</sup> He lays down the doctrine that receiving such paper in payment or as security for a pre-existing debt is receiving it for a valuable consideration. 'Thus,' he says, 'it may pass, not only as security for new purchases and advances made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts. In this way the creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. Otherwise, the discounts, by banks, of negotiable securities, are restricted, and credit and circulation of negotiable paper hampered.' This doctrine is followed by the weight of authority throughout the United States. And it certainly seems the sounder business policy to maintain that the transfer of a negotiable security, both in payment and as security for an antecedent debt, is a transfer for value.<sup>190</sup> However, the courts of some jurisdictions, and particularly of the state of New York, have taken issue with the doctrine of Judge Story.<sup>191</sup> The reasoning of these courts is based not so much upon the practical doctrines of commercial convenience as upon the strict logic of the law itself. Their doctrine is that the position of the bona fide holder rests its foundations upon the equitable doctrine that a purchaser who holds the legal title to property merely as security or as the payment of a pre-

<sup>189</sup> *Swift v. Tyson*, 16 Pet. 1, 14, Johns. Cas. Bills & N. 179.

<sup>190</sup> *Bank of Metropolis v. New England Bank*, 1 How. 234; *Barney v. Earle*, 13 Ala. 106; *Brush v. Scribner*, 11 Conn. 388; *Meadow v. Bird*, 22 Ga. 246; *Conkling v. Vall*, 31 Ill. 166; *McKnight v. Knisely*, 25 Ind. 336; *Homes v. Smyth*, 16 Me. 177; *Blanchard v. Stevens*, 3 Cush. 162; *Thacher v. Pray*, 113 Mass. 291; *Outhwite v. Porter*, 13 Mich. 533; *Stevenson v. Hyland*, 11 Minn. 198 (Gil. 128); *Struthers v. Kendall*, 41 Pa. St. 214; *Dixon v. Dixon*, 31 Vt. 450. See, also, *Bridgeport City Bank v. Welch*, 29 Conn. 475; *Manning v. McClure*, 36 Ill. 490; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *Fisher v. Fisher*, 98 Mass. 303; *Armour v. McMichael*, 36 N. J. Law, 92; *Cobb v. Doyle*, 7 R. I. 550.

<sup>191</sup> *Stalker v. McDonald*, 6 Hill (N. Y.) 93.



existing debt, without parting with anything of value, is not entitled to hold as against the prior equitable owner. The two elements of absence of knowledge and value given must concur to make the holder's equity a superior one. And taking the instrument as a mere security or in nominal payment of a pre-existing debt is not giving value for it. Hence, the position of the holder, lacking the element of value given, does not entitle him to overthrow the defenses which other parties may interpose.<sup>192</sup> There must be value given or allowed, on his part, on the strength of the identical paper on which the action is brought, to make the holder a purchaser for value.<sup>193</sup> The comparative equities of prior parties and the holder turn upon this point. In case of payment the question is whether he has taken the instrument in nominal payment, without other evidence of intention to discharge it than the ordinary business transaction of accepting it, or receipting it in payment, or crediting it on account. In each of these latter cases he stands in the position he held before receipt of the paper, with the added property of the paper in his hands, for which he has neither given nor suffered anything. His right to proceed upon the original indebtedness after the maturity of the paper is unimpaired. And equity will not tolerate his holding the additional paper, to the prejudice of those parties who have prior rights or defenses which render his claim a wrongful one. Hence, the rule is established in many states, in contradiction to the wiser theory of Judge Story, that one who receives paper before it is due, without any notice or knowledge of any fraud in its inception or transfer, but for a precedent debt, and without parting with any value or valuable consideration, does not acquire a valid title to the paper, but takes it subject to all its infirmities.<sup>194</sup> The courts who have adopted this position have, how-

<sup>192</sup> *Watson v. Sidney F. Woody Printing Co.*, 56 Mo. App. 145.

<sup>193</sup> *Bay v. Coddington*, 5 Johns. Ch. 54, Johns. Cas. Bills & N. 183.

<sup>194</sup> *Phoenix Ins. Co. v. Church*, 81 N. Y. 218; *Comstock v. Hier*, 73 N. Y. 269; *Turner v. Treadway*, 53 N. Y. 650; *Weaver v. Barden*, 49 N. Y. 286; *Lawrence v. Clark*, 36 N. Y. 128; *Farrington v. Frankfort Bank*, 24 Barb. 554; *Moore v. Ryder*, 65 N. Y. 438; *Rosa v. Brotherson*, 10 Wend. 85; *Payne v. Cutler*, 13 Wend. 605; *Goggerley v. Cuthbert*, 2 Bos. & P. (N. R.) 170; *Evans v. Kymer*, 1 Barn. & Adol. 528; *Jones v. Fort*, 9 Barn. & C. 764; *Wormley v. Lowry*, 1 Humph. (Tenn.) 468; *Ingham v. Vaden*, 3 Humph. (Tenn.) 51; *Rhea v. Allison*, 3 Head (Tenn.) 176; *Hickerson v. Raiguel*, 2 Heisk. (Tenn.) 329.

ever, confined the scope of the rule to narrow limits. If it appears that the holder has in any wise given value for the transfer, his title has been supported.

"This has given rise to a large number of decisions as to the meaning of value in taking paper, both in payment of and as collateral security for a precedent debt, which may be approximately classified as follows:

"(1) Value is given upon transfer when the instrument is transferred in satisfaction of a pre-existing debt, whether it is in whole or part payment of the debt,<sup>†</sup> or whether the instrument surrendered has matured, or is not yet due.<sup>‡</sup> This is because the creditor, in surrendering his rights under the old debt in exchange for the new paper, parts with value.\*

"(2) Value is given upon transfer when, at the time thereof, security is surrendered by the holder in consideration of the receipt by him of the instrument. Such a holder takes the instrument free from the defenses of antecedent parties, to the extent of the collaterals surrendered.<sup>‡‡</sup>

"The situation of the creditor discharging a pre-existing debt or surrendering securities in consideration of the transfer of paper to him, from a legal point of view, is not dissimilar to that of a creditor receiving paper as collateral security for a debt due from the transferrer to him. In taking the paper as collateral security, the creditor still retains all his rights upon the original indebtedness. The paper is received by him merely to further assure the certainty of the recovery of his debt. He may or may not recover it in full,

<sup>†</sup> *Chrysler v. Renois*, 43 N. Y. 209.

<sup>‡</sup> *Day v. Saunders*, 1 Abb. Dec. 495; *Youngs v. Lee*, 12 N. Y. 551.

\* *Mayer v. Heidelberg*, 123 N. Y. 332, 25 N. E. 416; *American Exch. Nat. Bank v. New York B. & P. Co.*, 74 Hun. 446, 26 N. Y. Supp. 822; *Ward v. Howard*, 88 N. Y. 74; *Chrysler v. Renois*, 43 N. Y. 209; *Brown v. Leavitt*, 31 N. Y. 113; *Youngs v. Lee*, 12 N. Y. 551; *Mix v. National Bank of Bloomington*, 91 Ill. 20; *Bardsley v. Delp*, 88 Pa. St. 420; *Norton v. Waite*, 20 Me. 175; *Brush v. Scribner*, 11 Conn. 388; *Dixon v. Dixon*, 31 Vt. 450; *Kellogg v. Fancher*, 23 Wis. 21; *McKnight v. Knisely*, 25 Ind. 336; *Mayberry v. Morris*, 62 Ala. 116.

<sup>‡‡</sup> *Goodwin v. Conklin*, 85 N. Y. 21; *Phoenix Ins. Co. v. Church*, 81 N. Y. 218; *Park Bank v. Watson*, 42 N. Y. 490; *Bank of Salina v. Babcock*, 21 Wend. (N. Y.) 499.

and if he does not he may proceed upon his collateral. Therefore, in weighing the comparative equities of such persons, and those from whom the paper has been derived through wrong, the turning point is, naturally, value. This renders the equity superior or inferior according as it has or has not been given. And in determining the question the cases have been classified as follows:

“(1) Where the debt is contracted at the time of transfer and on the faith of the bill or note, or indorsement of a third party as collateral security, that debt itself forms a part of the consideration of the transfer, and constitutes value. This is because the holder may be supposed to part with his property upon the faith, not only of the principal instrument, but also of the instrument put up as collateral. The two, as elements of the consideration, are inseparable. The courts will not inquire whether the holder parted with value because of the original, or because of the collateral, paper. They consider such value given for both.<sup>195</sup>

“(2) Where the instrument is accommodation paper, that fact is no defense to a holder who receives it as collateral to a pre-existing debt. This is because the delivery of the instrument as collateral is in furtherance of the purpose of the accommodation, which was to obtain credit. The equity of the holder, who so takes it, is therefore superior to that of the accommodation party who gives it.<sup>196</sup> But the reason of this rule ceases to apply, and the rule itself is otherwise, when the instrument has been diverted or procured through fraud.<sup>197</sup>

“(3) Where the pre-existing debt has fallen due, and there is a transfer of a bill or note as collateral security, with an express agreement for delay, the forbearance is a sufficient consideration. This is because such forbearance is a surrender by the holder of his valuable right of immediate prosecution.<sup>198</sup> But the rule only ap-

<sup>195</sup> *Bank of New York v. Vanderhorst*, 32 N. Y. 553, 557; *Bank of Chenango v. Hyde*, 4 Cow. (N. Y.) 567; *Williams v. Smith*, 2 Hill. (N. Y.) 301.

<sup>196</sup> *Continental Nat. Bank v. Townsend*, 87 N. Y. 8; *Grocers' Bank v. Penfield*, 69 N. Y. 502; *Schepp v. Carpenter*, 51 N. Y. 602.

<sup>197</sup> *Schepp v. Carpenter*, 51 N. Y. 602, 604; *Spencer v. Ballou*, 18 N. Y. 327, 331; *Woodhull v. Holmes*, 10 Johns (N. Y.) 231; *Skilding v. Warren*, 15 Johns. (N. Y.) 274.

<sup>198</sup> *Mechanics' & Farmers' Bank of Albany v. Wixson*, 42 N. Y. 438; *Trad-*

plies for the reason that the holder, by valid agreement, has estopped himself from prosecuting. If, therefore, the agreement is invalid, and there is no legal reason why the holder should not prosecute, the receipt of the paper is upon a consideration which is worthless in law, and the holder is deemed to have given no value.<sup>199</sup>

"(4) In addition to these rules are the principles already discussed, which apply to the position of the holder taking the instrument as collateral, as when he takes it in payment. They are (a) where the note is received in payment of one then surrendered and canceled, or in absolute payment; (b) and where securities are surrendered. The principles upon which the title of the holder of collateral security rests regulate also the amount which may be collected out of it."

It is thus seen that the points of conflict are narrowed to quite meager limits. The greater number of the courts and text writers agree in considering the pledgee a holder for value in all cases. When no indulgence has been given the debtor, or other consideration passed which is recognized by the contra cases as sufficient to make the pledgee a holder for value, the courts having the weight of authority hold that the undertaking necessarily implied by becoming a party to the instrument, to fix the liability of prior parties by due presentment for payment, and due notice in case of nonpayment, will suffice to give the pledgee protection.<sup>200</sup> It is argued that the pledgee, by neglecting to take the steps necessary to fix the liability of prior parties, becomes liable to the pledgor for any loss so occurring, and therefore, since he is subject to the responsibilities, he is entitled to the rights, of a holder for value.<sup>201</sup> The courts of New York take the lead in support of the opposite view, but the cases in that state cannot be reconciled with each other.<sup>202</sup>

*ers' Bank of Rochester v. Bradner*, 43 Barb. (N. Y.) 379; *Burns v. Rowland*, 40 Barb. (N. Y.) 368; *Watson v. Randall*, 20 Wend. (N. Y.) 201.

<sup>199</sup> *Atlantic Nat. Bank of New York v. Franklin*, 55 N. Y. 235.

<sup>200</sup> *Railroad Co. v. National Bank*, 102 U. S. 25. And see *Penn Bank v. Frankish*, 91 Pa. St. 339; *Goodman v. Simmonds*, 19 Mo. 106; *Grant v. Kidwell*, 30 Mo. 455; *Brainard v. Reavis*, 2 Mo. App. 490; *First Nat. Bank v. Strauss*, 66 Miss. 479, 6 South. 233; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; *Straughan v. Fairchild*, 80 Ind. 598; *Continental Nat. Bank v. Townsend*, 87 N. Y. 10.

<sup>201</sup> *Railroad Co. v. National Bank*, 102 U. S. 25.

<sup>202</sup> See 1 Daniel, Neg. Inst. (4th Ed.) § 831.

A pledgee of a negotiable instrument to secure future advances is protected, as a bona fide holder, for all advances made before he receives notice of defenses to the instrument;<sup>203</sup> or, if he is under a binding contract to make further advances, he is protected for advances so made after notice, up to the amount he is so bound to advance.<sup>204</sup>

A pledgee of negotiable paper can pass a good title thereto, though he transfers it in violation of the rights of the pledgor.<sup>205</sup> But not if the transferee has notice of the character in which the pledgee holds the paper.<sup>206</sup> Such notice may be given by an indorsement on the instrument that it is transferred to the pledgee as collateral security.<sup>207</sup>

*Same—Nonnegotiable Instruments.*

But a pledgee of a nonnegotiable instrument or chose in action acquires only the rights of the pledgor, and takes the pledge subject to all equities which existed against the pledgor.<sup>208</sup> So, too, a pledgee, in such cases, can transfer no better title than he has himself.<sup>209</sup> But a bona fide purchaser for value of a nonnegotiable

<sup>203</sup> Kerr v. Cowen, 2 Dev. Eq. (N. C.) 356; Buchanan v. International Bank, 78 Ill. 500; Matthews v. Rutherford, 7 La. Ann. 225.

<sup>204</sup> Kerr v. Cowen, 2 Dev. Eq. (N. C.) 356, 358.

<sup>205</sup> Coit v. Humbert, 5 Cal. 260; Ballard v. Burgett, 40 N. Y. 314, 318; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Sargent v. Metcalf, 5 Gray (Mass.) 306; Stoddard v. Kimball, 6 Cush. (Mass.) 469; Fisher v. Fisher, 98 Mass. 303; Wheeler v. Guild, 20 Pick. (Mass.) 545; Valette v. Mason, 1 Ind. 288; Trustees of Iowa College v. Hill, 12 Iowa, 462; Patterson v. Deering, 1 A. K. Marsh. (Ky.) 326.

<sup>206</sup> Vinton v. King, 4 Allen (Mass.) 562; National Bank of North America v. Kirby, 108 Mass. 495.

<sup>207</sup> Haskell v. Lambert, 16 Gray (Mass.) 592; Costelo v. Crowell, 127 Mass. 392; Robins v. May, 11 Adol. & E. 213.

<sup>208</sup> Works v. Meritt, 105 Cal. 467; Moore v. Metropolitan Nat. Bank, 55 N. Y. 41; Fullerton v. Sturges, 4 Ohio St. 529.

<sup>209</sup> International Bank v. German Bank, 71 Mo. 183; Weirick v. Mahoning County Bank, 16 Ohio St. 297; People v. Johnson, 100 Ill. 537; Isett v. Lucas, 17 Iowa, 503, 507; Burtis v. Cook, 16 Iowa, 194. The payee of a nonnegotiable note, secured by mortgage, who transfers the note and mortgage as collateral security for a debt, is not liable to the transferee for any deficiency arising on foreclosure of the mortgaged premises. Haber v. Brown, 101 Cal. 445, 35 Pac. 1035.



chose in action, from one upon whom the owner has, by assignment, conferred the apparent absolute ownership, where the purchase is made upon the faith of such apparent ownership, obtains a valid title, as against the real owner, who is estopped from asserting a title in hostility thereto.<sup>210</sup> And so a pledgee from one having such indicia of ownership would take free from the claims of the real owner.<sup>211</sup>

*Same—Certificates of Stock.*

Certificates of stock in a corporation are not regarded as negotiable instruments, in the sense of the commercial law, so that, by their indorsement and delivery to a pledgee in good faith, a title to the stock they profess to represent may be acquired.<sup>212</sup> They contain, in the first place, no words of negotiability. They declare, simply, that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer, or to the order of the party to whom they are given.

Stocks are not, like bank bills, the immediate representative of money, and intended for circulation. Nor are they, like notes and bills of exchange, invented to supply the exigencies of commerce, and governed by the peculiar code of the commercial law. They are not like exchequer bills and government securities, which are made negotiable either for circulation, or to find a market. Nor are they like corporation bonds, which are issued in negotiable form for sale, and as a means for raising money for corporate uses. The distinction between all these and corporate stocks is marked and striking. They are all, in some form, the representative of money.

<sup>210</sup> *Combes v. Chandler*, 33 Ohio St. 178; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, overruling *Bush v. Lathrop*, 22 N. Y. 535.

<sup>211</sup> *International Bank v. German Bank*, 71 Mo. 183; *Weirick v. Mahoning County Bank*, 16 Ohio St. 297; *Combes v. Chandler*, 33 Ohio St. 178; *Weyh v. Boylan*, 85 N. Y. 394; *Ashton's Appeal*, 73 Pa. St. 153; *Cowdrey v. Vandenberg*, 101 U. S. 572; *Merchants' Banking Co. of London v. Phoenix Bessemer Steel Co.*, 5 Ch. Div. 205, 217; *Goodwin v. Roberts*, L. R. 10 Exch. 76. The pledgee, however, must be without notice. *Swan v. Produce Bank of New York*, 24 Hun (N. Y.) 277.

<sup>212</sup> The assignment of shares of railroad stock as collateral security for a pre-existing debt, not contracted on the faith of the security, confers upon the assignee no better title than his assignor had, and he takes subject to equities. *City of Cleveland v. State Bank of Ohio*, 16 Ohio St. 236.

and may be satisfied by payment in money at a time specified. Certificates of stock are not securities for money, in any sense. Much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member.<sup>213</sup> When spurious certificates of stock are issued by an agent of a corporation which had no power to issue such stock, pledgees or purchasers of such stock acquire no right to share pro rata the corporate assets with the holders of the real stock,<sup>214</sup> but the corporation may be liable on the certificates wrongfully issued, by having given the agent apparent authority to issue the stock, and so made it possible for him to defraud innocent persons relying on such apparent authority.<sup>215</sup>

Pledges of stock being subject to the same rules as pledges of corporeal property, it follows that a pledge of certificates which have been stolen, or the possession of them obtained by fraud, is invalid against the owner.<sup>216</sup> But if he voluntarily parted with his possession, though induced to do so by a consideration affected with fraud, a bona fide pledgee acquires rights superior to the defrauded owner.<sup>217</sup> And, as was seen in discussing the title a pledgee of corpo-

<sup>213</sup> *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599; *Wilson v. Little*, 2 N. Y. 443, 447; *Roberts' Appeal*, 85 Pa. St. 84; *Weston v. Bear River and A. Water & Mining Co.*, 5 Cal. 186; *Pinkerton v. Manchester & L. R. R.*, 42 N. H. 424, 447; *City Fire Ins. Co. v. Olmsted*, 33 Conn. 476, 480; *Platt v. Hawkins*, 43 Conn. 139; *Platt v. Birmingham Axle Co.*, 41 Conn. 253, 267; *Shropshire Union Railway & Canal Co. v. Reg.*, L. R. 7 H. L. 496; *Shipman v. Aetna Ins. Co.*, 29 Conn. 245; *Hall v. Rose Hill & E. Road Co.*, 70 Ill. 673.

<sup>214</sup> *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. Cas. (Pa.) 180; *Hall v. Rose Hill & E. Road Co.*, 70 Ill. 673; *In re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 584.

<sup>215</sup> *Tome v. Parkersburg R. Co.*, 39 Md. 36; *Appeal of Kisterbock*, 127 Pa. St. 601, 18 Atl. 381; *Willis v. Fry*, 13 Phil. (Pa.) 23; *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231. And see cases in preceding note.

<sup>216</sup> *Pratt v. Taunton Copper Manuf'g Co.*, 123 Mass. 110; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Berclih v. Marye*, 9 Nev. 312; *Davis v. Bank of England*, 2 Bing. 393; *Taylor v. Great Indian Peninsula Ry. Co.*, 4 De Gex & J. 559.

<sup>217</sup> *McNeil v. Tenth Nat. Bank of New York*, 46 N. Y. 325; *Moore v. Miller*,

real chattels acquires, a pledgee of stock may be invested with rights thereto by estoppel.<sup>218</sup> The rights of a bona fide holder, to whom the apparent owner of the stock has pledged it, as against the true owner of the stock, depend on the principle that one who has conferred upon another, by a written transfer, all the indicia of ownership of property, is estopped to assert title to it, as against a third person who has, in good faith, purchased it, for value, from the apparent owner.<sup>219</sup> This rule does not hold good when the pledgor is known to be an agent, or to be acting in some fiduciary relation to the owner of the stock.<sup>220</sup> The knowledge may be acquired in any way, and notice is implied when the certificates run

6 Lans. (N. Y.) 396; Crocker v. Crocker, 81 N. Y. 507; Wood's Appeal, 92 Pa. St. 379; Burton's Appeal, 93 Pa. St. 314; Pennsylvania Ry. Co.'s Appeal, 86 Pa. St. 80; Otis v. Gardner, 105 Ill. 436; Walker v. Detroit Transit Ry. Co., 47 Mich. 338, 11 N. W. 187; Strange v. Houston & T. C. R. Co., 53 Tex. 162; Mount Holly, L. & M. Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Thompson v. Toland, 48 Cal. 112; Stone v. Marye, 14 Nev. 362; Borland v. Clark, 26 Kan. 349.

<sup>218</sup> Otis v. Gardner (1883) 105 Ill. 436; Strange v. Houston & T. C. R. Co., 53 Tex. 162; Fraser v. City Council of Charleston, 11 S. C. 486. And see cases cited in preceding note. One who pledges stock is not thereby estopped to assert his claims against the corporation for money owing him, and therefore his assignee for the benefit of creditors can enforce such claims, though it render the stock worthless. Janney v. Merchants' & Planters' Nat. Bank, 13 South. 761, 98 Ala. 515.

<sup>219</sup> Wood's Appeal, 92 Pa. St. 376; Bentinck v. Bank, 3 Reports, 120, [1893] 2 Ch. 120; Persch v. Quiggle, 57 Pa. St. 247; Jarvis v. Rogers, 13 Mass. 105. The owner of stock certificates, fraudulently pledged by one holding them as trustee, is not estopped from claiming them of the pledgee, by standing by, after having notified the pledgee of his claim, and demanding the stock, and without protest witnessing the pledgee pay an assessment theretofore made on the stock. Shaw v. Spencer, 100 Mass. 382. Where a bank wrongfully pledged stock deposited with it, the facts that the stock was issued in the name of the owner, and that the power of attorney to transfer it was a detached paper, and not acknowledged before a notary public, as required by the rules of the stock exchange, do not charge the pledgees with notice of the defect in the pledgor's title. Smith v. Savin, 36 N. E. 338, 141 N. Y. 315.

<sup>220</sup> Porter v. Parks, 49 N. Y. 564; Newberry v. Detroit & L. S. Iron Manuf'g Co., 17 Mich. 141; Denny v. Lyon, 38 Pa. St. 98. But see Felt v. Heye, 23 How. Prac. (N. Y.) 359.

to the pledgor as "trustee,"<sup>221</sup> or to the "estate of" a deceased person.<sup>222</sup>

Same—*Bills of Lading.*

*End thus Jan 16th*

A bill of lading represents the property, and any bona fide title, for valuable consideration, obtained through a pledge of the bill of lading, is as valid and effectual a title to the goods as could be obtained by an actual delivery of the goods themselves.<sup>223</sup> But a bill of lading, even when, in terms, running to order or assigns, is not negotiable, like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances.<sup>224</sup> If the bill of lading is once assigned or indorsed generally by the original holder, upon or with a view to a sale of the

<sup>221</sup> *Jaudon v. National City Bank*, 8 Blatchf. 430, Fed. Cas. No. 7,230; *Duncan v. Jaudon*, 15 Wall. 165; *Swan v. Produce Bank*, 24 Hun (N. Y.) 277; *Budd v. Munroe*, 18 Hun (N. Y.) 316; *Shaw v. Spencer*, 100 Mass. 382; *Sturtevant v. Jaques*, 14 Allen (Mass.) 523; *Fisher v. Brown*, 104 Mass. 259; *Gaston v. American Exchange Nat. Bank*, 29 N. J. Eq. 98; *Naples v. Medlin*, 1 Murphy (N. C.) 219.

<sup>222</sup> *Ham v. Ham*, 58 N. H. 70; *Pannell v. Hurley*, 2 Colly. 241.

<sup>223</sup> *Rowley v. Bigelow*, 12 Pick. (Mass.) 307; *Forbes v. Boston & L. R. Co.*, 133 Mass. 154; *Hathaway v. Haynes*, 124 Mass. 311; *First Nat. Bank of Green Bay v. Dearborn*, 115 Mass. 219; *First Nat. Bank of Cairo v. Crocker*, 111 Mass. 163; *Allen v. Williams*, 12 Pick. (Mass.) 297; *De Wolf v. Gardner*, 12 Cush. (Mass.) 19; *Bank of Rochester v. Jones*, 4 N. Y. 497; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169; *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 631; *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568; *First Nat. Bank of Cincinnati v. Kelly*, 57 N. Y. 34; *Holmes v. German Security Bank*, 87 Pa. St. 525; *Peters v. Elliott*, 78 Ill. 321, 326; *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 190; *Taylor v. Turner*, 87 Ill. 296; *Security Bank of Minnesota v. Luttgen*, 29 Minn. 363, 13 N. W. 151; *Emery v. Irving Nat. Bank*, 25 Ohio St. 360; *Adoue v. Seeligson*, 54 Tex. 593; *McCants v. Wells*, 4 S. C. 381; *First Nat. Bank of Peoria v. Northern R. Co.*, 58 N. H. 203; *Gibson v. Stevens*, 8 How. (U. S.) 384; *Shaw v. Railroad Co.*, 101 U. S. 557, 564; *Dows v. National Exchange Bank*, 91 U. S. 618.

<sup>224</sup> *Barnard v. Campbell*, 55 N. Y. 462; *Allen v. Williams*, 12 Pick. (Mass.) 297; *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145; *Canadian Bank of Commerce v. McCrea*, 106 Ill. 281; *Burton v. Curryea*, 40 Ill. 320; *Evansville & T. H. R. Co. v. Erwin*, 84 Ind. 457, 466; *The Idaho*, 93 U. S. 575.

property, a subsequent transfer thereof to a bona fide pledgee may indeed give him a good title, as against the original owner.<sup>225</sup> But so long as the bill of lading remains in the hands of the original party, or of an agent intrusted with it for a special purpose, and not authorized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title, as against the principal.<sup>226</sup> Statutes have been passed in a number of states which declare bills of lading to be negotiable.<sup>227</sup> But bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often pledged by transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that statutes which make them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intend to change totally their character, put them, in all respects, on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible; such as the liability of indorsers, the duty of demand *ad diem*, notice of nondelivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief.<sup>228</sup>

<sup>225</sup> *Gibson v. Stevens*, 8 How. (U. S.) 384; *Lee v. Bowen*, 5 Biss. (U. S.) 154, Fed. Cas. No. 8,183; *Farmers' & Mechanics' Nat. Bank of Buffalo v. Logan*, 74 N. Y. 568; *First Nat. Bank of Cincinnati v. Kelly*, 57 N. Y. 34; *Dows v. Kidder*, 84 N. Y. 121; *Comer v. Cunningham*, 77 N. Y. 391; *Paddon v. Taylor*, 44 N. Y. 371; *First Nat. Bank of Cairo v. Crocker*, 111 Mass. 163; *Forbes v. Boston & L. R. Co.*, 133 Mass. 154; *First Nat. Bank of Chicago v. Bayley*, 115 Mass. 228; *De Wolf v. Gardner*, 12 Cush. (Mass.) 19; *Holmes v. Bailey*, 92 Pa. St. 57; *Emery v. Bank*, 25 Ohio St. 360, 366.

<sup>226</sup> *Stollenwerck v. Thacher*, 115 Mass. 224; *Pease v. Gloahec*, L. R. 1 P. C. 219; *Gurney v. Behrend*, 3 El. & Bl. 622.

<sup>227</sup> California, Civ. Code, §§ 2127, 2128. Maryland, Rev. Code 1878, p. 298, art. 35, § 12; Acts 1876, c. 262. Minnesota, Gen. St. 1878, c. 124, § 17; Gen. St. 1894, § 7649. Missouri, Rev. St. 1879, p. 88, §§ 558, 559. New York, 3 Rev. St. (7th Ed.) 1892, pp. 2259, 2260. Pennsylvania, Brightly, *Purd.* Dig. 1873, p. 114. Wisconsin, Rev. St. 1878, p. 1011, § 4194; *Id.* p. 1049, § 4425.

<sup>228</sup> *Shaw v. Railroad Co.*, 101 U. S. 557; *Tiedeman v. Knox*, 53 Md. 612, 614.



When a bill of lading is attached to a time draft drawn on the consignee, it is regarded as security for the acceptance of the draft, and not for its payment.<sup>229</sup> The consignee is therefore entitled to the delivery of the bill of lading when he accepts the draft.<sup>230</sup> When the consignor of goods takes a bill of lading, which he pledges, the pledgee acquires rights superior to those of the consignee.<sup>231</sup> On the other hand, when the consignee has the bill of lading, and pledges it, the consignor cannot subsequently stop the goods in transitu without paying the pledgee the amount secured to him.<sup>232</sup> If a bill of lading consists of more than one part, a pledgee advancing money on one of the set has a better title than a subsequent purchaser taking the goods or a duplicate bill.<sup>233</sup> But the carrier is justified in delivering the goods on the production of any of the parts of the bill, though another part has been previously pledged.<sup>234</sup>

*Same—Warehouse Receipts.*

Warehouse receipts are not negotiable, in the legal sense, so as to enable the person holding them to transfer a greater right or title to the property mentioned in them than he himself had. Their only office is to stand in the place of the property itself, for the convenience of the parties interested in the property. A pledge of such receipts has the same effect as a pledge of the property,—no greater and no less.<sup>235</sup> And although warehouse receipts are made nego-

<sup>229</sup> *Dows v. National Exchange Bank*, 91 U. S. 618, 630; *National Bank of Commerce v. Merchants' Nat. Bank*, 91 U. S. 92; *Mears v. Waples*, 4 Houst. (Del.) 62; *Landfear v. Blossman*, 1 La. Ann. 148.

<sup>230</sup> *National Bank of Commerce v. Merchants' Bank*, 91 U. S. 92; *Schuchardt v. Hall*, 36 Md. 590; *Securly Bank of Minnesota v. Luttgen*, 29 Minn. 363, 13 N. W. 151; *Marlne Bank of Chicago v. Wright*, 48 N. Y. 1; *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 631.

<sup>231</sup> *Richardson v. Nathan*, 167 Pa. St. 513, 31 Atl. 740; *Hieskell v. Farmers' & Mechanics' Nat. Bank*, 89 Pa. St. 155; *Bank of Rochester v. Jones*, 4 N. Y. 497, 501.

<sup>232</sup> *Kemp v. Falk*, 7 App. Cas. 573; *Spalding v. Ruding*, 6 Beav. 376.

<sup>233</sup> *Skilling v. Bollman*, 6 Mo. App. 76. And see *Hieskell v. Farmers' & Mechanics' Nat. Bank*, 89 Pa. St. 155; *Meyerstein v. Barber*, L. R. 2 C. P. 38; *Id.*, L. R. 4 H. L. 317, 331.

<sup>234</sup> *Glyn, Mills, Currie & Co. v. East & West India Dock Co.*, 7 App. Cas. 591.

<sup>235</sup> *Burton v. Curyea*, 40 Ill. 320; *Western Union R. Co. v. Wagner*, 65 Ill. 497; *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419; *Gibson v. Chillicothe*

liable by statute in some states,<sup>286</sup> the pledgee of a receipt takes no better title, and stands in no better attitude, than if the goods themselves were held by him. Such receipts are in lieu of and represent the property to which they refer, and their negotiability serves only to cut off any defense the warehouse keeper may have.<sup>287</sup> Any other construction would enable any one, fraudulently depositing the goods of another, to pass title, as against the true owner, by obtaining a warehouse receipt in his own name.<sup>288</sup> A pledgee of a warehouse receipt can hold the goods against the owner in the same cases in which a pledgee of the goods themselves could.<sup>289</sup> A ware-

Branch of State Bank of Ohlo, 11 Ohlo St. 311; Newcomb v. Cabell, 10 Bush (Ky.) 460; Stewart v. Phoenix Ins. Co., 9 Lea (Tenn.) 104; Horr v. Barker, 8 Oal. 603; St. Louis Nat. Bank v. Ross, 9 Mo. App. 399; Fourth Nat. Bank v. St. Louis Cotton Compress Co., 11 Mo. App. 333; Gibson v. Stevens, 8 How. (U. S.) 384. Under the New York factors' act (Laws 1830, c. 179), one who ~~lends~~ <sup>lends</sup> money on the security of negotiable warehouse receipts for goods acquires a lien on such goods superior to that of bankers who have advanced money to the consignors of the goods upon an agreement that the same shall be sold for such bankers' account, and the proceeds specially remitted, but who have placed the bills of lading in the consignees' hands, enabling them to deal with the goods as their own. Blydenstein v. New York Security & Trust Co. (C. C. A.) 67 F. 469. The giving of nonnegotiable warehouse receipts by a vendee of whisky stored in a bonded warehouse to a creditor of such vendee, to secure a pre-existing debt, operates only as a pledge of such whisky, and does not affect an existing vendor's lien on the whisky. Vogel-sang's Adm'r v. Fisher (Mo. Sup.) 31 S. W. 13.

<sup>286</sup> California, Codes & St. Supp. 1880, § 6855; Connecticut, Pub. Acts 1878, c. 40, § 6; Illinois, Rev. St. 1889, c. 114, § 142; Indiana, Acts 1879, p. 232, § 3, and Rev. St. 1881, § 6543 (Rev. St. 1894, § 8722); Iowa, Rev. Code 1880, p. 582, § 2171; Kansas, Laws 1879, c. 23, § 154; Kentucky, Act March 6, 1860, § 3; Maine, Laws 1878, c. 38; Massachusetts, Acts 1878, c. 93, § 1, and Pub. St. 1882, c. 72, § 6; Maryland, Rev. Code 1878, p. 298, § 14; New York, Rev. St. 1875, p. 230, § 6, and Rev. St. 1882 (7th Ed.) p. 2260. Wisconsin, Rev. St. 1878, c. 78, §§ 1676, 1678.

<sup>287</sup> First Nat. Bank of Louisville v. Boyce, 78 Ky. 42; Greenbaum v. Megibben, 10 Bush (Ky.) 419; Second Nat. Bank of Toledo v. Walbridge, 19 Ohio St. 419.

<sup>288</sup> First Nat. Bank of Louisville v. Boyce, 78 Ky. 42, 56.

<sup>289</sup> As where a fraudulent purchaser has taken a warehouse receipt for the goods and transferred it. Chicago Dock Co. v. Foster, 48 Ill. 507; Ditson v. Randall, 33 Me. 202; Fourth Nat. Bank v. St. Louis Cotton Compress Co., 11 Mo. App. 333; Western Union R. Co. v. Wagner, 65 Ill. 197; Hoyt v. Baker,

houseman who has fraudulently issued a receipt for goods not in his possession is estopped to deny the receipt.<sup>240</sup> But if a receipt is issued by mistake, the warehouseman is not estopped.<sup>241</sup> Nor does an estoppel arise against him, by reason of statements in his receipt as to matters not within his knowledge; for instance, as to the grade of wheat stored with him.<sup>242</sup> When the agent of a warehouseman issues receipts for goods not in fact received, not having authority to do so from his principal, the latter is not bound thereby.<sup>243</sup>

*Special Property of Pledgee—Right to Possession—Right of Action.*

A pledgee acquires, in the chattels pledged, a special property, commensurate with his rights as pledgee. The most important element of this special property is his right to hold possession.<sup>244</sup> This right, on the death of the pledgee, passes to his personal representatives, in the absence of any other disposition.<sup>245</sup> The effect of a surrender of possession to the pledgor will be hereafter considered both as to the pledgor himself and as to third persons.<sup>246</sup> If the possession of the pledgee is tortiously interfered with by the pledgor

15 Abb. Prac. (N. S.; N. Y.) 405; *McCombie v. Spader*, 1 Hun (N. Y.) 193; *Paddon v. Taylor*, 44 N. Y. 371; *Barnard v. Campbell*, 55 N. Y. 456. See ante, p. 135.

<sup>240</sup> *Griswold v. Haven*, 25 N. Y. 595; *Stewart v. Phoenix Ins. Co.*, 9 Lea (Tenn.) 104.

<sup>241</sup> *Second Nat. Bank of Toledo v. Walbridge*, 19 Ohio St. 419; *Hale v. Milwaukee Dock Co.*, 29 Wis. 482.

<sup>242</sup> *Robson v. Swart*, 14 Minn. 371 (Gil. 287). And see *Hale v. Milwaukee Dock Co.*, 29 Wis. 482.

<sup>243</sup> *Peoples' Bank v. Gayley*, 92 Pa. St. 518.

<sup>244</sup> *Coleman v. Shelton*, 2 McCord's Ch. (S. C.) 126; *Yeatman v. Savings Inst.*, 95 U. S. 764; *Mitchell v. Brown*, 6 Cold. (Tenn.) 505; *Printup v. Johnson*, 19 Ga. 73; *Kittera's Estate*, 17 Pa. St. 416. A pledgee may hold more than one security as collateral for the same debt. *Union Bank of Georgetown v. Laird*, 2 Wheat. 390.

<sup>245</sup> *Henry v. Eddy*, 34 Ill. 508. An assignment of his interest in a mortgage and notes pledged as security for a loan, by the executor of the pledgee, is valid, and not a fraud on the pledgor, though payment is not first demanded of the pledgor, nor notice given him that such assignment is to be made, as it does not affect his position or right to redeem. *Drake v. Cloonan*, 99 Mich. 121, 57 N. W. 1098.

<sup>246</sup> Post, p. 171.

or by a stranger, he may maintain detinue or replevin for recovery of his possession,<sup>247</sup> or trover for the conversion of the property.<sup>248</sup> A distinction should be observed between trover to enforce a pledge against the general owner, or one converting the goods by his direction, and the like action against a stranger. In the latter case, the pledgee may recover the full value, though exceeding his lien, and then stand as trustee for the pledgor as to the balance;<sup>249</sup> but, when the action is against the pledgor or one acting under him, the pledgee can recover only according to his special interest,<sup>250</sup> i. e. the amount of his debt.

*Right to Use the Pledge.*

Ordinarily, and in the absence of any agreement or assent by the pledgor, the pledgee has no right to use the thing pledged,<sup>251</sup> and a use of it is illegal.<sup>252</sup> But, under special circumstances, depending

<sup>247</sup> *Noles v. Marable*, 50 Ala. 366.

<sup>248</sup> *United States Exp. Co. v. Meints*, 72 Ill. 293; *Treadwell v. Davis*, 34 Cal. 601; *Roeder v. Green Tree Brewery Co.*, 33 Mo. App. 69; *Brownell v. Hawkins*, 4 Barb. (N. Y.) 491. The pledgee of a promissory note may maintain an action against a pledgor for the conversion of the note, where the latter has obtained the note, though without fraud, under an agreement that he is to return it or another note, which agreement he refuses to comply with. *Way v. Davidson*, 12 Gray (Mass.) 465.

<sup>249</sup> *Adams v. O'Connor*, 100 Mass. 515; *Ullman v. Barnard*, 7 Gray (Mass.) 554; *Pomeroy v. Smith*, 17 Pick. (Mass.) 85; *Lyle v. Barker*, 5 Bin. (Pa.) 457; *Baldwin v. Bradley*, 69 Ill. 32; *Benjamin v. Strempel*, 13 Ill. 466; *United States Exp. Co. v. Meints*, 72 Ill. 293; *Treadwell v. Davis*, 34 Cal. 601; *Soule v. White*, 14 Me. 436.

<sup>250</sup> *Treadwell v. Davis*, 34 Cal. 601; *Lyle v. Barker*, 5 Bin. (Pa.) 457, 460; *Ingersoll v. Van Bokkellin*, 7 Cow. (N. Y.) 681; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248; *Hurst v. Coley*, 15 Fed. 645.

<sup>251</sup> By the civil law there are two kinds of pledges,—the pawn and antichresis. A thing is said to be pawned when a movable thing is given as security. The antichresis is when the security given consists in immovables. Rev. Civ. Code La. 1870, tit. 20, art. 3135. In the antichresis the creditor acquires the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due to him, and afterwards from the principal of his debt. Rev. Civ. Code La. 1870, tit. 20, art. 3176; *Livingston's Ex'r v. Story*, 11 Pet. 351.

<sup>252</sup> *Stearns v. Marsh*, 4 Denio (N. Y.) 227; *McArthur v. Howett*, 72 Ill. 358, 360. But see *Thompson v. Patrick*, 4 Watts (Pa.) 414.



somewhat upon the nature of the pledge, and in all cases with the assent of the pledgor, express or implied, the property pledged may be used by the pledgee in any way consistent with the general ownership and the ultimate rights of the pledgor.<sup>253</sup> For instance, the pledgee of a horse must give it a necessary amount of exercise, and is entitled to the use which may result incidentally. The rule as to use of the pledge laid down in *Coggs v. Bernard*,<sup>254</sup> and in some of the books, namely, that the pledge may be used if it will not be injured thereby, is clearly erroneous, because it is said that the pledgee uses it at his peril, which would not be true if the use itself was lawful.

*Profits of the Pledge.*

A pledgee is entitled to hold the profits and increase of the pledge as a part of his security, but they are held in trust—First, to apply any fruits or proceeds of them towards the payment of the debt; and, secondly, if the debt is paid in full from other funds, to restore the property, or any such fruits or proceeds thereof as may have been received, to the pledgor.<sup>255</sup> So, where cows are pledged, the pledgee would be required to account for any profits received from their milk.<sup>256</sup> For it is the duty of a pawnee, at common law, to render a due account of all the income, profits, and advantages derived by him from the pledge, in all cases where such an account is

<sup>253</sup> *Lawrence v. Maxwell*, 53 N. Y. 19.

<sup>254</sup> "But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, etc.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril, for whereas if she keeps them locked up in her cabinet, if her cabinet should be broken open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is *Owen*, 123. But if the pawn be of such a nature as the pawnee is at any charge, about the thing pawned, to maintain it, as a horse, cow, etc., then the pawnee may use the horse in a reasonable manner, or milk the cow, etc., in recompense for the meat." *Coggs v. Bernard*, 2 Ld. Raym. 909, 916.

<sup>255</sup> *Felton v. Brooks*, 4 Cush. (Mass.) 203, 206; *Merrifield v. Baker*, 9 Allen (Mass.) 29.

<sup>256</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909, 917.



within the scope of the bailment. If, for instance, the pawn is a slave, the profits of his labor are to be accounted for.<sup>257</sup> And some authorities think the pledgee is liable for all the profits he might have received, but for his own negligence. And this would, doubtless, be true in all cases where there is an obligation to employ the pledge at a profit. As, if there is a pledge of money, and it is agreed that it shall be let out at interest by the pledgee, and he neglects his duty. If he lets it out, in the absence of an agreement, and receives profit, he must account therefor.<sup>258</sup> But when money is deposited as a pledge, while the pledgee holds it as such, he is not chargeable with any interest upon it, to be paid by himself; for it was not a debt which the pledgor forbore to him, so as to be entitled to payment for the forbearance. Being a pledgee, he is subject to the liabilities of a pledgee, but not to those of a debtor.<sup>259</sup>

*Same---Stock---Right to Vote.*

The pledgee can collect dividends on stock,<sup>260</sup> and interest coupons on bonds,<sup>261</sup> but he is required to account for these as for other profits.<sup>262</sup> A pledgee of stock may vote it, if it stands in his name.<sup>263</sup> In several states there are express statutory enactments providing that a pledgee may vote on stock held by him.<sup>264</sup>

<sup>257</sup> *Geron v. Geron*, 15 Ala. 558; *Houton v. Holliday*, 2 Murph. (N. C.) 111, *Woodard v. Fitzpatrick*, 9 Dana (Ky.) 117, 120.

<sup>258</sup> *Gilson v. Martin*, 49 Vt. 471; *Hunsaker v. Sturgis*, 29 Cal. 142; *Merrifield v. Baker*, 9 Allen (Mass.) 29.

<sup>259</sup> Story, Bailm. § 339.

<sup>260</sup> *Hunsaker v. Sturgis*, 29 Cal. 142; *Hagar v. Union Nat. Bank*, 63 Me. 509; *Herrman v. Maxwell*, 47 N. Y. Super. Ct. 347; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, 464; *Gaty v. Holliday*, 8 Mo. App. 118; *Kellogg v. Stockwell*, 75 Ill. 68, 71; *Fairbanks v. Merchants' Nat. Bank of Chicago*, 30 Ill. App. 28.

<sup>261</sup> *Androscoggin R. Co. v. Auburn Bank*, 48 Me. 335.

<sup>262</sup> See cases cited in the last two notes.

<sup>263</sup> *Ex parte Willcocks*, 7 Cow. (N. Y.) 402; *In re Barker*, 3 Wend. (N. Y.) 509; *Becher v. Wells Flouring Mill Co.*, 1 Fed. 276.

<sup>264</sup> *Indiana*, Rev. St. 1881, § 3009; *Maine*, Acts 1872, c. 69; *Maryland*, Rev. Code 1878, p. 316, § 13; *Missouri*, Rev. St. 1879, § 714; *Nevada*, 2 Comp. Laws 1873, § 3400; *New Hampshire*, Gen. Laws 1878, p. 355, § 12; *Idaho*, Rev. Laws 1875, p. 622, § 12; *New Mexico*, Gen. Laws 1882, p. 206, § 12; *Washington*, Code 1881, § 2432; *Wyoming*, Comp. Laws 1876, c. 34, § 17.

*Expenses of the Pledge.*

The pledgee is entitled to be reimbursed for expenses incurred by him which were necessary in keeping and caring for the pledged property.<sup>265</sup> This includes the premiums on an insurance policy held in pledge,<sup>266</sup> and money paid in removing the lien of an incumbrance superior to the lien of the pledge.<sup>267</sup>

*Same—Assessments on Stock.*

So, too, the pledgee can charge the pledgor with any assessments on stock held by him which he has been compelled to pay.<sup>268</sup> Upon the question whether a pledgee of stock becomes liable thereon for unpaid subscriptions, the authorities may be divided into three classes: First. Where the pledgee of stock has taken a transfer of the stock directly to himself, and has had such transfer registered on the books of the corporation. It has been held that, in such case, the pledgee is liable for assessments.<sup>269</sup> Second. Where the pledgee has sought to relieve himself by making a transfer of the stock to an irresponsible third person. In such case he is liable.<sup>270</sup> Third. Where no transfer is made to the pledgee, and his name is

<sup>265</sup> *Hills v. Smith*, 28 N. H. 369; *Starrett v. Barber*, 20 Me. 457; *Hendricks v. Robinson*, 2 Johns. Ch. (N. Y.) 283; *Fagan v. Thompson*, 38 Fed. 467. One of two joint pledgees cannot recover from the other compensation for caring for and selling the pledged property, where there was no agreement therefor. *Central Trust Co. v. New York Equipment Co.*, 87 Hun, 421, 34 N. Y. Supp. 349.

<sup>266</sup> *Raley v. Ross*, 59 Ga. 862.

<sup>267</sup> *Furness v. Bank*, 147 Ill. 570, 35 N. E. 624. One who takes notes as collateral security for a debt is entitled, as against the owner thereof, to be allowed the cost of realizing, including a reasonable attorney's fee. *Gregory v. Pike*, 15 C. C. A. 33, 67 Fed. 837. But, for a case in which attorney's fees were not allowed the pledgee in defending an action against the real owner, see *Work v. Tibblits*, 87 Hun, 352, 34 N. Y. Supp. 308.

<sup>268</sup> *McCalla v. Clark*, 55 Ga. 53.

<sup>269</sup> *National Bank v. Case*, 99 U. S. 628; *Pullman v. Upton*, 96 U. S. 328; *Johnson v. Underhill*, 52 N. Y. 203; *In re Empire City Bank*, 18 N. Y. 199; *Adderly v. Storm*, 6 Hill (N. Y.) 624; *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *Crease v. Babcock*, 10 Metc. (Mass.) 525; *Hale v. Walker*, 31 Iowa, 344; *Magruder v. Colston*, 44 Md. 349; *Wheelock v. Kost*, 77 Ill. 296; *Aultman's Appeal*, 98 Pa. St. 505.

<sup>270</sup> *National Bank v. Case*, 99 U. S. 628; *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246; *Davis v. Stevens*, 17 Blatchf. 259, Fed. Cas. No. 3,653.

not registered as owner, but the owner of the stock puts it into the hands of a third person to hold for the benefit of the pledgor and pledgee. In such case the pledgee has never been held responsible.<sup>271</sup> Statutes in a number of states exempt the pledgee from liability on stock held by him as collateral,<sup>272</sup> and such a statute has been held to extend the exemption to one who was a pledgee from the corporation itself.<sup>273</sup>

*Care Required of the Pledgee.*

A pledge is for the mutual benefit of both parties, and in such a case the bailee is bound to exercise ordinary care;<sup>274</sup> and, in determining what constitutes such care, the nature and value of the property, and the means of protection possessed by the pledgee, and the relation of the parties, and other circumstances, must be considered.<sup>275</sup> The general question of the care required in a bailment for mutual benefit has already been sufficiently discussed.<sup>276</sup>

<sup>271</sup> *Anderson v. Philadelphia Warehouse Co.*, 4 Fed. 130.

<sup>272</sup> *Colorado*, Gen. Laws 1877, p. 150, § 210; *Dakota*, Laws 1879, p. 14, c. 9; *Indiana*, St. 1876, p. 371, §§ 8, 9, and Rev. St. 1881, § 3008 (Rev. St. 1894, § 3431); *Maryland*, Rev. Code 1878, p. 323, § 61; *Massachusetts*, Pub. St. 1882, c. 105, § 25; *Missouri*, 1 Rev. St. 1879, §§ 934, 935; *New York*, 2 Rev. St. 1881 (7th Ed.) p. 1548, § 11; *Ohio*, Rev. St. 1880, § 3259; *Washington*, Code 1891, § 1512; *Wisconsin*, Rev. St. 1878, p. 532, § 1827; *Wyoming*, Comp. Laws 1876, c. 34, §§ 16, 17. And see *Beal v. Essex Sav. Bank*, 15 C. C. A. 128, 67 Fed. 816; *Pauly v. State Loan & Trust Co.*, 7 C. C. A. 422, 58 Fed. 666; *Borland v. Nevada Bank*, 99 Cal. 89, 33 Pac. 737.

<sup>273</sup> *Burgess v. Seligman*, 2 Sup. Ct. 10; *Matthews v. Albert*, 24 Md. 527. But see *Griswold v. Seligman*, 72 Mo. 110; *Fisher v. Seligman*, 75 Mo. 13.

<sup>274</sup> *Commercial Bank v. Martin*, 1 La. Ann. 344; *Cooper v. Simpson*, 41 Minn. 46, 42 N. W. 601; *Girard Fire & Marine Ins. Co. v. Marr*, 46 Pa. St. 504; *Erie Bank v. Smith*, 3 Brewst. (Pa.) 9; *Third Nat. Bank v. Boyd*, 44 Md. 47; *St. Losky v. Davidson*, 6 Cal. 643; *Scott v. Crews*, 2 S. C. 522; *Petty v. Overall*, 42 Ala. 145; *Wells v. Wells*, 53 Vt. 1; *Cutting v. Marlor*, 78 N. Y. 454; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263, 23 N. E. 875; *Hollister v. Central Nat. Bank*, 119 N. Y. 634, 23 N. E. 878.

<sup>275</sup> *Damon v. Waldeufel*, 99 Cal. 234, 33 Pac. 903; *Cutting v. Marlor*, 78 N. Y. 454. Where a life insurance policy is assigned to secure the assignee against a contingent liability, dependent on the life of the assured, and such assignee is paid by a third person a sum sufficient to pay the premiums while such contingency exists, but he does not agree to pay them, he is not

<sup>276</sup> See ante, pp. 10, 50, 87.

*Same—Collection of Negotiable Paper.*

But a pledgee holding negotiable paper as collateral security is required to use a different kind of diligence from that required of one holding merchandise or other corporeal property, and yet the diligence in each case is only such as is appropriate to the nature of the property.<sup>277</sup> If the property be precious stones, safe-keeping is all that is required. If it be grain, it must be properly stored and protected from all injury. The diligence required of the holder of promissory notes or other securities for the payment of money has reference to the danger that the parties liable on them may become insolvent and unable to pay. A prudent business man will collect such obligations when they are due, or will endeavor to enforce them by suit. If, therefore, a pledgee neglects to enforce the collection of such securities held in pledge, and delays till the parties liable become insolvent, he is as much guilty of negligence as if he had suffered grain held in pledge to be destroyed by dampness or heat, for lack of proper storage.<sup>278</sup> Accordingly, if the pledge consists of

liable in damages to the assured's estate for permitting the policy to lapse by failure to apply the money received to the payment of such premiums. *Killoran v. Sweet*, 25 N. Y. Supp. 295, 72 Hun, 194. Where a creditor holds as security logs, which he is to manufacture into lumber, sell the lumber, and apply the net proceeds on the debt, he must use reasonable diligence to secure the best net results, account for the proceeds, and show what expenditures were necessarily or reasonably incurred. *Second Nat. Bank v. Sproat* (Minn.) 56 N. W. 254. If a theft of the pawn was occasioned by his negligence, he is responsible; if without any negligence, he is discharged from liability. *Petty v. Overall*, 42 Ala. 145. A pledgee is responsible, also, for the negligence of his servants as well as his own negligence. But he would not be responsible for the negligence of an attorney employed to collect negotiable instruments held in pledge if he used reasonable care in selecting the attorney. *Commercial Bank v. Martin*, 1 La. Ann. 344.

<sup>277</sup> A creditor to whom claims are transferred as collateral security is bound to use ordinary diligence in collecting them, and is liable for loss resulting from his failure to do so; but, if the transfer merely authorizes such creditor to receive the proceeds of the claims when collected, and apply them to the payment of his debt, he is not bound to prosecute their collection. *Miller v. Gettysburg Bank*, 8 Watts (Pa.) 192.

<sup>278</sup> *Hazard v. Wells*, 2 Abb. N. C. (N. Y.) 444; *Barrow v. Rhinelander*, 3 Johns. Ch. (N. Y.) 614; *Muirhead v. Kirkpatrick*, 21 Pa. St. 237; *Bank of U. S. v. Peabody*, 20 Pa. St. 454; *Sellers v. Jones*, 22 Pa. St. 423; *Lyon v. Huntingdon Bank*, 12 Serg. & R. (Pa.) 61; *Lamberton v. Windom*, 12 Minn.



(1)  
 indorsed negotiable paper, the pledgee must present it for payment at maturity, and, if it is not paid, must give notice to charge the indorsers, or, if loss ensues, he will be liable to make it good.<sup>279</sup> However, as against the pledgor himself, a pledgee is not held to such strict rules in regard to the presentation at maturity of a note taken as collateral security and notice of nonpayment to the pledgor. The note is not received, although indorsed by the pledgor, upon the condition that the pledgee would exercise such diligence. It does not represent the original debt, and, to hold the pledgor, it is not necessary that the pledgee should regularly proceed to have the note presented and protested. It was not a satisfaction or extinguishment of the original debt, and a failure to give notice will not, necessarily, defeat a recovery on the pledge debt.<sup>280</sup> The pledgee will be liable for neglecting to put the collateral in suit, when a prudent man would do it, if any loss results from the neglect.<sup>281</sup> In such

232 (Gil. 151); *Noland v. Clark*, 10 B. Mon. (Ky.) 239; *Roberts v. Thompson*, 14 Ohio St. 1; *Reeves v. Plough*, 41 Ind. 204.

<sup>279</sup> *Swift v. Tyson*, 16 Pet. 1, 1 Am. Lead. Cas. Eq. 411, 423, note; *Smith v. Miller*, 43 N. Y. 171; *Wheeler v. Newbould* 16 N. Y. 392; *McLughan v. Bovard*, 4 Watts (Pa.) 308; *Sellers v. Jones*, 22 Pa. St. 423; *Muirhead v. Kirkpatrick*, 21 Pa. St. 237; *Fetterton v. Roope*, 2 Lea (Tenn.) 215; *Alexandria, L. & H. R. Co. v. Burke*, 22 Grat. (Va.) 254; *Foot v. Brown*, 2 McLean. 369, Fed. Cas. No. 4,909; *Lea v. Baldwin*, 10 Ga. 208. And see *Goodall v. Richardson*, 14 N. H. 567.

<sup>280</sup> *Westphal v. Ludlow*, 2 McCrary, 505, 6 Fed. 348. Where a note is deposited as collateral security for an existing debt, and for collection, it falls within the law of agency, and not within the strict rules of commercial law applicable to negotiable paper, so that the agent is bound only to use due diligence to collect the same. *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Hamilton v. Cunningham*, 2 Brock. 350, Fed. Cas. No. 5,978; *Westphal v. Ludlow*, 6 Fed. 348. If the holder of a bill as collateral refuses to return it, or to make any effort to collect it, he is liable for the loss resulting from his negligence. *Childs v. Corp*, 1 Paine, 285, Fed. Cas. No. 2,677; *Allen v. King*, Id. 226; *Roberts v. Thompson*, 14 Ohio St. 1.

<sup>281</sup> *Ex parte Mure*, 2 Cox, Ch. 63; *Williams v. Price*, 1 Sim. & S. 581; *Wakeman v. Gowdy*, 10 Bosw. (N. Y.) 208; *Hoard v. Garner*, 10 N. Y. 261; *Lyon v. Huntingdon Bank*, 12 Serg. & R. (Pa.) 61; *Lamberton v. Windom*, 12 Minn. 232 (Gil. 151); *Slevin v. Morrill*, 4 Ind. 425, 426; *Whitin v. Paul*, 13 R. 1. 40. But see 1 Am. Lead. Cas. 404. The same rule applies to securities, not negotiable, held as collateral; for instance, a judgment. *Hanna v. Holton*, 78 Pa. St. 334. If a pledgee, without the consent of the debtor, renews or ex-



suit the pledgee collects the full amount of the instrument,<sup>282</sup> and holds any balance, over and above the amount secured to him, for the pledgor, unless there were equities existing against the pledgor, in which case the pledgee can collect only the amount due him.<sup>283</sup> Where there is danger of loss the pledgee should proceed to collect the collateral, though the pledge debt is not due.<sup>284</sup> He cannot compromise without the pledgor's consent.<sup>285</sup>

*Redelivery of Pledge.*

When the pledge is redeemed, it is the pledgee's duty to redeliver the property pledged,<sup>286</sup> together with all its increase and profits.<sup>287</sup>

tends a note pledged as collateral, or surrenders such note and takes new security, he must account to his debtor as if he had collected it in full. *Haas v. Bank of Commerce*, 60 N. W. 85, 41 Neb. 754.

<sup>282</sup> No demand by the pledgee on the maker is necessary in such case to enable him to sue. *White v. Phelps*, 14 Minn. 27 (Gil. 21).

<sup>283</sup> *Williams v. Smith*, 2 Hill (N. Y.) 301; *City Bank v. Taylor*, 60 Iowa, 66, 14 N. W. 128; *Steere v. Benson*, 2 Ill. App. 560; *Valette v. Mason*, 1 Ind. 89; *Mayo v. Moore*, 28 Ill. 428; *Ehrler v. Worthen*, 47 Ill. App. 550; *Barmby v. Wolfe*, 44 Neb. 77, 62 N. W. 318; *Haas v. Bank*, 41 Neb. 754, 60 N. W. 85. So, in the case of a note given for the pledgor's accommodation. *Atlas Bank v. Doyle*, 9 R. I. 76; *Doud v. Reid*, 53 Mo. App. 553. Where the debt for which a note was pledged is paid pending an action on the note by the pledgee, the latter may continue the action, subject to all equitable defenses, holding the proceeds as trustee for the pledgor. *First Nat. Bank v. Mann*, 27 S. W. 1015, 94 Tenn. 17. Where notes held as collateral are impounded in an equity suit, the pledgee is still entitled to control the same, so far as necessary to bring an action at law thereon, and have the proceeds paid into court. *Gregory v. Pike*, 15 C. C. A. 33, 67 Fed. 837.

<sup>284</sup> *Mr. Jones (Pledges, § 667)* says there is, in such case, no duty to collect until the principal debt falls due. But the cases cited (*Overlock v. Hills*, 8 Me. 383; *Bast v. Bank*, 101 U. S. 93) do not seem to support his proposition.

<sup>285</sup> *Hawks v. Hincheliff*, 17 Barb. (N. Y.) 492; *Grant v. Holden*, 1 E. D. Smith (N. Y.) 545; *Gage v. Punchard*, 6 Daly (N. Y.) 229; *Garlick v. James*, 12 Johns. (N. Y.) 146; *Zimbleman v. Veeder*, 98 Ill. 613; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Depuy v. Clark*, 12 Ind. 427; *Wood v. Matthews*, 73 Mo. 477, 479; *Stevens v. Hurlbut Bank*, 31 Conn. 146.

<sup>286</sup> *Dean v. Lawham*, 7 Or. 423; *Lyle v. Barker*, 5 Bin. (Pa.) 457, 458; *Mullen v. Morris*, 2 Pa. St. 85. The pledgee is bound to restore the pledge, in the condition in which he received it, on payment of the debt. *Stearns v. Marsh*, 4 Denio (N. Y.) 227.

<sup>287</sup> *Davenport v. Tarlton*, 1 A. K. Marsh. (Ky.) 244; *Woodard v. Fitzpatrick*, 9 Dana (Ky.) 117; *Hunsaker v. Sturgis*, 29 Cal. 142, *Geron v. Geron*, 15 Ala. 558; *Houton v. Holliday*, 2 Murphy (N. C.) 111.

This duty is fulfilled only by a delivery of the identical property received,<sup>288</sup> except in the case of a pledge of certificates of stock.<sup>289</sup> In such case no injury is done the pledgor by requiring him to accept another certificate of precisely similar character in lieu of it. His own certificate was only the evidence that he owned an undivided interest in the capital and business of the corporation. Another certificate of the same kind, for the same amount of stock, would entitle him to precisely the same rights as the former certificate. Each would be a precise equivalent of the other, and it is certain he could suffer no pecuniary loss by the transaction; while "the nature of the property, or rather of his interest in it, forbids the idea that it could be the object of personal attachment, or have a peculiar value in his estimation, as contradistinguished from any other equal number of shares in the same company."<sup>290</sup>

*Same—Conversion by the Pledgee.*

As it is the duty of the pledgee to redeliver the pledge upon redemption, if he wrongfully sells the property pledged, he is guilty of a conversion.<sup>291</sup> But a sale by the pledgee is not, ipso facto, a con-

<sup>288</sup> The pledgee must redeliver the identical article pledged, where it is distinctive in its character, and for a failure to do so renders himself liable in trover, for the full value of the property pledged, without any deduction for his debt. *Ball v. Stanley*, 5 Yerg. (Tenn.) 199. And equity may be invoked for this purpose where the law fails. *Bryson v. Rayner*, 25 Md. 424.

<sup>289</sup> *Gilpin v. Howell*, 5 Pa. St. 41; *Horton v. Morgan*, 19 N. Y. 170; *Gruman v. Smith*, 81 N. Y. 25; *Stewart v. Drake*, 46 N. Y. 449; *Worthington v. Torrey*, 34 Md. 182; *Atkins v. Gamble*, 42 Cal. 86; *Hawley v. Brumagin*, 33 Cal. 394. And, as to redelivery of the identical bonds deposited in pledge, see *Stuart v. Bigler's Assignees*, 98 Pa. St. 80.

<sup>290</sup> *Atkins v. Gamble*, 42 Cal. 86.

<sup>291</sup> The pledgee may recoup the amount of his debt when sued for the conversion of the pledged property, or for any tort with respect thereto. *Stearns v. Marsh*, 4 Denio, 227. Where assignors for benefit of creditors, before the assignment, convert stock pledged to them as security, the pledgor is not entitled to payment in full for his claim for the value of the stock converted out of the assigned estate, on the ground that the conversion was a breach of trust, which entitled him to follow the proceeds specifically. *In re Jamison & Co.'s Estate*, 163 Pa. St. 143, 29 Atl. 1001. The fact that the transferee of pledged securities converts them does not render the original pledgee liable in trover. *Waddle v. Owen*, 43 Neb. 489, 61 N. W. 731.

version.<sup>292</sup> It may be for the interest of the pledgor to keep his contract alive, and, if it is so, he may do it. The maxim that no one shall take any advantage by his own wrongful act applies.<sup>293</sup> But, although the unlawful sale does not, per se, operate as a conversion, yet the pledgor may, at his option, so consider it; and he may regard the contract as at an end, tender or offer to pay his debt, and demand his pledge,<sup>294</sup> or may sue for damages for the sale.<sup>295</sup> As to the measure of damages in such cases there is a conflict of opinion. Some authorities hold that the value of the property at the time of its wrongful sale or loss is the proper rule;<sup>296</sup> others, that

<sup>292</sup> The pledgee of goods does not, by asserting that the transaction was an out and out sale, divest himself of his special property in the goods, or relieve the pledgor from tendering the sum advanced. *Yungmann v. Briesmann*, 4 Reports, 119, 67 Law T. 642, 41 Wkly. Rep. 148.

<sup>293</sup> *Hopper v. Smith*, 63 How. Prac. (N. Y.) 34, 38.

<sup>294</sup> *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. 321; *Amos v. Sinnott*, 5 Ill. 440; *Cooper v. Ray*, 47 Ill. 53; *Henry v. Eddy*, 34 Ill. 508; *Kennedy's Adm'x v. Hammond*, 16 Mo. 341; *Hope v. Lawrence*, 1 Hun (N. Y.) 317. In an action by the pledgor of a note as collateral against the pledgee, for conversion thereof, plaintiff need not tender the debt for which the collateral was pledged, where the full amount thereof has been realized by defendant. *E. F. Hallack Lumber Manuf'g Co. v. Gray*, 19 Colo. 149, 34 Pac. 1000.

<sup>295</sup> *Leighton v. Burkham*, 7 Ohio Cir. Ct. R. 487; *Ratcliff v. Vance*, 1 Mills (S. C.) 349; *Bush v. Lyon*, 9 Cow. (N. Y.) 52; *Cass v. Higenbotam*, 100 N. Y. 248, 249, 3 N. E. 189, 190; *Halliday v. Holgate*, L. R. 3 Exch. 299, 302; *McNeil v. Tenth Nat. Bank of New York*, 55 Barb. (N. Y.) 59; *Campbell v. Parker*, 9 Bosw. (N. Y.) 322. A sale of a pledge by the pledgee, before the maturity of a debt secured thereby, if unauthorized by the agreement, renders the pledgee liable for a breach of trust, though he afterwards purchases other articles of the same kind and value to replace those sold. *Dykers v. Allen*, 7 Hill (N. Y.) 497. A debtor may ratify his creditor's exchange of pledged property by bringing an action, within a reasonable time, to recover the property got by the exchange, and against one who has attached it as the creditor's property, unless there is evidence inconsistent with that of ratification. *Strong v. Adams*, 30 Vt. 221. A debtor may repudiate his creditor's exchange of pledged property by bringing an action, within a reasonable time, to recover the original property pledged by him to secure his debt. *Id.*

<sup>296</sup> *Robinson v. Hurley*, 11 Iowa, 410; *Blood v. Erie Dime Sav. & Loan Co.*, 164 Pa. St. 95, 30 Atl. 362; *Loomis v. Stave*, 72 Ill. 623; *Belden v. Perkins*, 73 Ill. 449; *Fowle v. Ward*, 113 Mass. 548; *Newcomb-Buchanan Co. v. Baskett*, 14 Bush (Ky.) 658; *Rosenzweig v. Frazer*, 82 Ind. 342; *Hudson v. Wilkinson*, 61 Tex. 606; *Grimes v. Watkins*, 59 Tex. 140.

It is the value at the time of redemption and demand,<sup>297</sup> or even the highest intermediate value.<sup>298</sup> The question arises when there is a conversion of pledged property which is subject to fluctuations in value. The measure of damages in trover is, ordinarily, the value of the property at the time of the conversion;<sup>299</sup> and it is apprehended that this is the rule to be applied to the present question. Where the ground of the action was the alleged breach of the contract of pledge, by reason of the failure on the part of a bank to exercise due care in the custody of bonds pledged, whereby they were lost, the true measure of damages was held to be their market value, computed at the time of the loss.<sup>300</sup> It was said that, after the bonds had been lost, and it had become impossible to return them, there was no necessity for a demand, and, when made, it could have no significance or effect in determining the rights of the parties. These had become fixed when the breach occurred by the loss of the bonds, and so the proper measure of damages is their value, computed at that time.<sup>301</sup> That the other rule of damages is productive of injustice may be readily seen. Stocks that cost the owner little or nothing, now and then advance to par, and above. Suppose the owner of such stocks should pledge them when not worth 10 cents on the dollar, and the pledgee convert them. Circumstances arise, however, which enhance their value. By delaying his suit, or the trial of it, until these circumstances have had their full effect, the pledgor, by invoking the aid of the presumptions (1) that he had parted with his money for the stock; (2) that he obtained the stock as a permanent investment; and (3) that it is to be presumed that he would have kept it until the time of the trial,—can elect to take

<sup>297</sup> *Pinkerton v. Manchester & L. R. Co.*, 42 N. H. 424; *Reynolds v. Witte*, 13 S. C. 5; *Baltimore C. P. Ry. Co. v. Sewell*, 35 Md. 238; *Fowle v. Ward*, 113 Mass. 548.

<sup>298</sup> *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Page v. Fowler*, 39 Cal. 412; *Wilson v. Little*, 2 N. Y. 443. Or the highest value within a reasonable time after the pledgor becomes aware of the conversion. *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338; *Baker v. Drake*, 53 N. Y. 211; *Wright v. Bank of the Metropolis*, 110 N. Y. 237, 18 N. E. 79; *Galigher v. Jones*, 129 U. S. 200, 9 Sup. Ct. 335. And see 2 Sedg. Dam. (8th Ed.) §§ 509-514, 520-523.

<sup>299</sup> *Stirling v. Garritee*, 18 Md. 468.

<sup>300</sup> *Thrd Nat. Bank v. Boyd*, 44 Md. 47.

<sup>301</sup> *Id.*

the market value at the time of trial, when each of these presumptions is baseless. Such a rule, instead of being general, fixed, and certain, is merely speculative, conjectural, and dependent upon accidental circumstances.<sup>302</sup>

*End Sat Jan 18th*

SAME—OF PLEDGEE AFTER DEFAULT.

35. After default of the pledgor, the pledgee has the following remedies:

- (a) He may sue on the debt secured without losing his lien (p. 163).
- (b) He may sell the pledged property—
  - (1) At common law, upon notice to the pledgor (p. 164).
  - (2) By a proceeding in equity, when his right is disputed or an account is necessary (p. 168).
  - (3) Under a power of sale given by the pledge contract (p. 169).
  - (4) Under a power given by statute (p. 170).

**NOTE**—Some statutes take away the power to sell at common law or under a power.

After the debt secured or the engagement to be performed is due, the pledgee may continue to hold the pledge until it is redeemed,<sup>303</sup> or he may pursue any one of the remedies enumerated in the black letter text.<sup>304</sup> If he sells the pledge, any surplus remaining in his hands, after the satisfaction of his claims, he holds for the pledgor.<sup>305</sup>

<sup>302</sup> *Sturges v. Keith*, 57 Ill. 451; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308; *Falk v. Fletcher*, 18 C. B. (N. S.) 403.

<sup>303</sup> *Robinson v. Hurley*, 11 Iowa, 410; *Rozet v. McClellan*, 48 Ill. 345. A contract or pledge may make it the duty of the pledgee to sell within a specified time, and his failure to do so is then such breach of duty as will render him answerable to the pledgor. *Cooper v. Simpson*, 41 Minn. 46, 42 N. W. 601.

<sup>304</sup> *Robinson v. Hurley*, 11 Iowa, 410.

<sup>305</sup> *Stearns v. Marsh*, 4 Denio, 227; *Hunt v. Nevers*, 15 Pick. (Mass.) 500; *Whittaker v. Bank*, 52 N. J. Eq. 400, 29 Atl. 203. The application of a surplus arising from a sale of securities may be made pro rata to all liabilities mentioned in a letter by the debtor to the pledgee, directing him to hold the



*Suit on the Debt.*

Where a creditor has collateral security for his debt, he is not compelled to rest exclusively upon such security for repayment, but, notwithstanding the pledge or collateral security, may look to the general credit of his debtor,<sup>806</sup> unless there is some agreement or contract, express or implied, to give time, or to look to a particular fund.<sup>807</sup> The creditor may sue the debtor, and recover a judgment against him for the amount of the debt, without destroying, or in the least affecting, his lien on the property pledged.<sup>808</sup> It is true that the extinguishment of a debt, if really extinguished, will destroy all liens existing on property pledged for its payment. It is also true that the original debt for which the property was pledged may be said, in one sense, to have been extinguished by being merged in the judgment,—a higher security. It is true that the original debt is so extinguished by having a judgment rendered thereon that another action could not be maintained on the original debt. But this is the only way in which it was extinguished. The debt, in fact, still remains, in a new form, but evidenced by a higher security, and the property pledged for its payment still remains liable there-

stock as a general collateral security for all the pledgor's liability to the pledgee at present existing, or which may thereafter be incurred by him. *Eichelberger v. Murdock*, 10 Md. 373.

<sup>806</sup> *Butterworth v. Kennedy*, 5 Bosw. (N. Y.) 143; *Rogers v. Ward*, 8 Allen (Mass.) 387; *Darst v. Bates*, 95 Ill. 493; *Whitwell v. Brigham*, 19 Pick. (Mass.) 117; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Sonoma Val. Bank v. Hill*, 59 Cal. 107; *Jones v. Scott*, 10 Kan. 33; *Smith v. Strout*, 63 Me. 205; *Ehrlick v. Ewald*, 66 Cal. 97, 4 Pac. 1062; *Grand Island Sav. & Loan Ass'n v. Moore*, 40 Neb. 686, 59 N. W. 115; *Ambler v. Ames*, 1 App. D. C. 191. The person holding collateral securities is not bound to resort to them before suing upon his principal claim; but, when that claim is satisfied, he may be compelled to release or reassign the collaterals. *Wallace v. Finnegan*, 14 Mich. 170. If a pawn is lost, the pledgee cannot recover on the debt for which it stood as security, without showing that the loss was in no wise attributable to any want of necessary care and diligence upon his part. *Crocker v. Monroe*, 18 La. 553.

<sup>807</sup> *Archibald v. Argall*, 53 Ill. 307; *Wilhelm v. Schmidt*, 84 Ill. 183; *Cornwall v. Gould*, 4 Pick. (Mass.) 444; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Bigelow v. Walker*, 24 Vt. 149.

<sup>808</sup> *Black v. Reno*, 59 Fed. 917; *Smith v. Strout*, 63 Me. 205; *Jones v. Scott*, 10 Kan. 35; *Charles v. Coker*, 2 S. C. 122.

for. The debt, in fact, remains until it is satisfied.<sup>809</sup> The pledgor, when sued on the pledge debt, cannot set off the value of the pledge.<sup>810</sup> But, in a number of states, it may be set off in this way when the pledgee has converted the pledge.<sup>811</sup> In these states the pledgee, when suing on the debt, must produce the pledge, or account for it, at the time of the trial.<sup>812</sup>

The pledgee may even attach the pledged property in a suit on the debt, but by so doing he waives the lien of the pledge.<sup>813</sup>

#### *Sale at Common Law.*

The property pledged may be sold after the debt which it was delivered to secure has become due, if such sale be made at public auction, and upon reasonable notice thereof to the pledgor.<sup>814</sup> An assignee of the pledgee's interest has the same right to sell that the pledgee has.<sup>815</sup> But the pledgor cannot compel a sale. His only remedy is to redeem.<sup>816</sup> The right to sell property in which the pledgor had only a limited interest has already been discussed.<sup>817</sup>

<sup>809</sup> Jones v. Scott, 10 Kan. 35.

<sup>810</sup> Winthrop Sav. Bank v. Jackson, 67 Me. 570.

<sup>811</sup> Stearns v. Marsh, 4 Denio (N. Y.) 227; Cass v. Higenbotam, 27 Hun (N. Y.) 406, 408; Bigelow v. Walker, 24 Vt. 149; Bank of British Columbia v. Marshall, 11 Fed. 19.

<sup>812</sup> Ocean Nat. Bank of New York v. Fant, 50 N. Y. 474; Smith v. Rockwell, 2 Hill (N. Y.) 482; Stuart v. Bigler's Assignees, 98 Pa. St. 80; Spalding v. Bank of Susquehanna Co., 9 Pa. St. 28. In an action by a pledgee upon the debt secured by the pledge, he is not required to account for nonnegotiable securities pledged to him by defendant, in the absence of any allegation or proof that he has lost or misappropriated them. Marberry v. Farmers' & Mechanics' Nat. Bank, 6 Tex. Civ. App. 607, 26 S. W. 215.

<sup>813</sup> Legg v. Willard, 17 Pick. (Mass.) 140; Whitaker v. Sumner, 20 Pick. (Mass.) 399; Buck v. Ingersoll, 11 Metc. (Mass.) 226. Contra, Arendale v. Morgan, 5 Sneed (Tenn.) 703. And compare Marshall v. Otto, 59 Fed. 249.

<sup>814</sup> Mauge v. Heringhl, 26 Cal. 577; Vaupell v. Woodward, 2 Sandf. Ch. (N. Y.) 143; Garlick v. James, 12 Johns. (N. Y.) 146; De Lisle v. Priestman, 1 Brown (Pa.) 176; Cushman v. Hayes, 46 Ill. 145; Union Trust Co. v. Rigdon, 93 Ill. 458; Robinson v. Hurley, 11 Iowa, 410.

<sup>815</sup> Alexandria, L. & H. R. Co. v. Burke, 22 Grat. (Va.) 254, 263.

<sup>816</sup> Mueller v. Nichols, 50 Ill. App. 663; Rozet v. McClellan, 48 Ill. 345; Badlam v. Tucker, 1 Pick. (Mass.) 389; Franklin Sav. Inst. v. Preetorius, 6 Mo. App. 470.

<sup>817</sup> See ante, p. 113.

When stock is pledged as collateral security, by delivery of the certificates, with blank transfers on the back, signed by the owner, the pledgee may sell the stock as the readiest mode of collection, giving the pledgor and his successor in interest reasonable notice to redeem, and of the time and place of sale.<sup>818</sup> So a broker, carrying stock for a customer on margins, can sell by giving the required notice; but a sale at the stock exchange without such notice would be a conversion, notwithstanding a custom of brokers to do so.<sup>819</sup> But a pledge of commercial paper as collateral security for the payment of a debt does not, in the absence of a special power for that purpose,<sup>820</sup> authorize the party to whom such paper is so pledged to sell the securities so pledged upon default of payment, either at public or private sale. He is bound to hold and collect the same as it

<sup>818</sup> Canfield v. Minneapolis Agricultural & Mechanical Ass'n, 14 Fed. 801; Brown v. Ward, 3 Duer (N. Y.) 660; Wallace v. Berdell, 24 Hun (N. Y.) 379.

<sup>819</sup> Wheeler v. Newbould, 16 N. Y. 392; Lawrence v. Maxwell, 53 N. Y. 10. Contra, Colket v. Ellis, 10 Phila. (Pa.) 375; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242; Bryson v. Rayner, 25 Md. 424.

<sup>820</sup> Union Trust Co. v. Rigdon, 93 Ill. 458; Fletcher v. Dickinson, 7 Allen (Mass.) 23, 25; Washburn v. Pond, 2 Allen (Mass.) 474; Stearns v. Marsh, 4 Denio (N. Y.) 227; Hunter v. Hamilton, 52 Kan. 195, 34 Pac. 782. A power of sale does not deprive the pledgee of the right to sue on the paper. Nelson v. Eaton, 26 N. Y. 410; Nelson v. Edwards, 40 Barb. (N. Y.) 279; Nelson v. Wellington, 5 Bosw. (N. Y.) 178. Where negotiable paper is pledged as collateral security for a loan, and the lender is authorized to sell the collaterals in case the loan is not paid at maturity, such authority does not limit the rights of the lender to a sale of the collateral, so as to prevent him from suing thereon. Holland Trust Co. v. Waddell, 75 Hun, 104, 36 N. Y. Supp. 980. Though a pledgee cannot, without express authority, sell commercial paper pledged as collateral security, a court may, under proper circumstances, order a judicial sale of it. Cleghorn v. Minnesota Title Ins. & Trust Co. (Minn.) 59 N. W. 320. The foreclosure and sale of a negotiable instrument held as a pledge is authorized, when the maker resides in a remote country or a different state, and it does not appear that he has any property within the jurisdiction subject to seizure and sale. Donohoe v. Gamble, 38 Cal. 341. Where a bond and mortgage having several years to run are assigned as collateral security for a loan due in three months, but the assignment does not provide for a sale of the security, the lender, on maturity of the loan, may sue in equity to procure a sale. Porter v. Frazer, 6 Misc. Rep. 533, 27 N. Y. Supp. 517. Where a mortgage and note were assigned as collateral security, with authority in the assignee, on default, to sell the mortgage, the pledgee was authorized to sell the note or debt. Watson v. Smith (Minn.) 62 N. W. 265.

becomes due, and apply the net proceeds to the payment of the debt so secured.<sup>321</sup> But negotiable bonds held in pledge may be sold without a power of sale.<sup>322</sup>

Before the pledgee can lawfully sell, personal notice to the pledgor to redeem, and of the intended sale, must be given; and if the pledgor cannot be found, and notice cannot be given him, judicial proceedings to authorize the sale must be resorted to.<sup>323</sup> Before giving notice, the pledgee has no right to sell the pledge, and, if he do, the pledgor may maintain trover without tendering the debt.<sup>324</sup> When the pledgor's liability is not fixed until a demand is made upon him, the pledgee must give him a notice sufficient to fix his liability, in addition to the notice of sale.<sup>325</sup> The general rule, in the absence of a

<sup>321</sup> *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Zimpleman v. Veeder*, 98 Ill. 613; *Fletcher v. Dickinson*, 7 Allen (Mass.) 22, 25; *Brookman v. Metcalf*, 5 Bosw. (N. Y.) 429; *Brown v. Ward*, 3 Duer (N. Y.) 660; *Lamberton v. Windom*, 12 Minn. 232 (Gil. 151); *Morris Canal & Banking Co. v. Lewis*, 12 N. J. Eq. 323; *In re Litchfield Bank*, 28 Conn. 575; *Whitaker v. Charleston Gas Co.*, 16 W. Va. 717; *Hunt v. Nevers*, 15 Pick. (Mass.) 500; *Joliet Iron Co. v. Scioto Fire Brick Co.*, 82 Ill. 584; *Wheeler v. Newbould*, 16 N. Y. 392; *Fletcher v. Dickinson*, 7 Allen (Mass.) 23, 25. So a savings bank book cannot be sold by a pledgee. *Boynton v. Payrow*, 67 Me. 587. An ordinary note and mortgage pledged cannot be sold. *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 667. But coupon bonds may be. *Morris Canal & Banking Co. v. Lewis*, 12 N. J. Eq. 323; *Merchants' Nat. Bank v. Thompson*, 133 Mass. 482.

<sup>322</sup> *Duffield v. Miller*, 92 Pa. St. 286; *Brown v. Ward*, 3 Duer (N. Y.) 660; *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155, 156.

<sup>323</sup> *Garlick v. James*, 12 Johns. (N. Y.) 146; *Stearns v. Marsh*, 4 Denio (N. Y.) 227; *Indiana & I. C. Ry. Co. v. McKernan*, 24 Ind. 62.

<sup>324</sup> *Stearns v. Marsh*, 4 Denio (N. Y.) 227; *Lucketts v. Townsend*, 3 Tex. 119; *Wilson v. Little*, 2 N. Y. 443; *E. F. Hallack Lumber & Manuf'g Co. v. Gray*, 19 Colo. 149, 34 Pac. 1000; *Smith v. Gavin*, 141 N. Y. 315, 36 N. E. 338; *Wheeler v. Newbould*, 16 N. Y. 392. But see *McCintock v. Central Bank*, 120 Mo. 127, 24 S. W. 1052. A pledgee, having authority to sell the pledged property on breach of the conditions of the pledge, may, before that event, agree to sell the property to a third person upon the happening thereof. *Taft v. Church*, 162 Mass. 527, 39 N. E. 283.

<sup>325</sup> *Garlick v. James*, 12 Johns. (N. Y.) 146; *Moffat v. Williams* (Colo. App.) 36 Pac. 914; *Milliken v. Dehon*, 27 N. Y. 364; *Wilson v. Little*, 1 Sandf. (N. Y.) 351. Consent that the pledgee may sell without giving notice does not relieve him from the necessity of demanding payment of the debt before he sells. *Wilson v. Little*, 2 N. Y. 443. The sale of stock pledged as collateral,



contract affecting the question, is that the pledgor must have notice of the time and the place of sale;<sup>826</sup> and the principal reason assigned for the rule is that he may have an opportunity to attend the sale, and see that it is fairly conducted; that he may exert himself in procuring buyers, and thus enhance the price;<sup>827</sup> that he has, in fact, the right to redeem the pledge at any moment before the sale shall be actually made.<sup>828</sup> These rules may be modified or waived by agreement.<sup>829</sup> But the only object of requiring notice to be given in such a case is to inform the debtor of the time and place of sale; and, when he is already otherwise fully informed on the subject, a further and more formal notice is unnecessary.<sup>830</sup> The case is not like a legal proceeding, in which service or waiver of notice should appear in the record. Here the whole matter is in pais, and the question is, did the debtor have actual notice of the time and place of sale? The safest course is to have a formal written notice served upon him, for then the fact of notice can be easily proved. If this safe course be not pursued, the pledgee must, at his peril, be prepared to prove

made in default of payment of a demand for a larger sum than that for which the stock was pledged, is a conversion of such stock, though, immediately prior to such sale, the pledgee offer to accept the amount justly due, plaintiff not having a reasonable time within which to comply with such offer. *Blood v. Erie Dime Savings & Loan Co.*, 164 Pa. St. 95, 30 Atl. 362. The notice must be to the pledgor or his assignee, or to some one authorized to receive notice. Notice given to an agent having no authority over the pledge is not sufficient. *Washburn v. Pond*, 2 Allen (Mass.) 474.

<sup>826</sup> *Wilson v. Little*, 2 N. Y. 443; *Lucketts v. Townsend*, 3 Tex. 119; *Stearns v. Marsh*, 4 Denio (N. Y.) 227; *Davis v. Funk*, 39 Pa. St. 243; *Diller v. Brubaker*, 52 Pa. St. 498; *McDowell v. Chicago Steel Works*, 124 Ill. 491, 16 N. E. 854. Notice given on November 13th is sufficient authority for the pledgee to sell hypothecated stock on November 20th, where, by the terms of the contract between the parties, the loan was payable on one day's notice, and, if not paid, according to the agreement, the defendant was authorized, without further notice, to sell the stock pledged for the purpose of satisfying the same. *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242.

<sup>827</sup> *Milliken v. Dehon*, 27 N. Y. 364, 369.

<sup>828</sup> *Milliken v. Dehon*, 27 N. Y. 364.

<sup>829</sup> *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242; *Bryson v. Rayner*. Id. 424; *McDowell v. Chicago Steel Works*, 124 Ill. 491, 16 N. E. 854; *Loomis v. Stave*, 72 Ill. 623; *Robinson v. Hurley*, 11 Iowa, 410; *Hamilton v. State Bank*, 22 Iowa, 306. And see *Belden v. Perkins*, 78 Ill. 449.

<sup>830</sup> *Alexandria, L. & H. R. Co. v. Burke*, 22 Grat. (Va.) 254, 264.



otherwise that the pledgor was informed of the time and place of sale a reasonable time before the same was to take place.<sup>331</sup> The sale must be public, unless the pledgor has agreed that the pledgee may sell at private sale.<sup>332</sup>

The pledgee cannot become the purchaser at a sale made by himself.<sup>333</sup> If he does so purchase, the pledgor has the right to treat it as a valid sale, or to treat it as void; and if he elects to treat the sale as void, then the title to the pledge remains precisely as if no sale had been made, with the lien of the pledgee still on it for the amount of his debt.<sup>334</sup>

### *Sale in Equity.*

Where there is a general pledge of personal property, neither the time of redemption nor the manner and time of sale being specified in the contract, the appropriate remedy of the pledgee, when his rights or powers are in any manner questioned or denied, is by a proceeding in equity, in which the court can make the pledge avail-

<sup>331</sup> Id.

<sup>332</sup> Bryson v. Rayner, 25 Md. 424; Jeanes' Appeal, 116 Pa. St. 573, 11 Atl. 862.

<sup>333</sup> Stokes v. Frazier, 72 Ill. 428; Killian v. Huffman, 6 Ill. App. 200; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242. But the pledgee may be given power to purchase by express contract. Chouteau v. Allen, 70 Mo. 290; Hamilton v. Schaack, 16 Wkly. Dig. (N. Y.) 423. The holder of collateral security cannot appropriate it in satisfaction of the debt at his own option. Diller v. Brubaker, 52 Pa. St. 498. Where a pledgee is an agent or trustee, and is authorized by the pledgor to purchase the pledge in his own right in case of sale, a purchase by the pledgee in his own right is valid, as between him and the pledgor. Manning v. Shriver (Md.) 28 Atl. 899.

<sup>334</sup> Bank of Old Dominion v. Dubuque & P. R. Co., 8 Iowa, 277; Bryson v. Rayner, 25 Md. 424; Maryland Fire Ins. Co. v. Dalrymple, Id. 242; Hyams v. Bamberger, 10 Utah, 3, 36 Pac. 202; Stokes v. Frazier, 72 Ill. 428. But the pledgor may ratify such a purchase. Hill v. Finigan, 62 Cal. 426; Carroll v. Mullanphy Sav. Bank, 8 Mo. App. 249. Pledgor has a right of election to treat the purchase of the pledged property by the pledgee at his own sale as invalid, but loses such right by failing to exercise it within a reasonable time after being informed of the purchase. Hill v. Finigan, 77 Cal. 267, 19 Pac. 494. Pledgor's election to treat the purchase of the pledged property by the pledgee at his own sale as valid cannot afterwards be retracted; nor can an election to disaffirm the sale be retracted or renewed at a later date, for the purpose of increasing the damages. Hill v. Finigan, 77 Cal. 267, 19 Pac. 494.

able, with due regard for the rights of all concerned.<sup>335</sup> In other cases a resort cannot be had to equity unless the taking of an account is necessary.<sup>336</sup> The court must order a sale in default of performance, for there can be no strict foreclosure; that is, it cannot be decreed that the pledgee shall become absolute owner if the pledgor fails to redeem within a certain time.<sup>337</sup>

*Sale under Power of Sale.*

The parties may, at the time of creating the relation of pledgor and pledgee, provide that the latter shall have power to sell the pledged property, on default, on such terms and in such manner as they see fit.<sup>338</sup> In the absence of a provision in the contract changing the rule where the property is susceptible of division, and will bring more by being divided and sold in separate parcels or lots than by being sold in a body, or where, by a sale of a part of the property, a sufficient amount can be realized to pay off the debt, then it is the duty of the pledgee to make the division, and sell a portion accordingly; and, if he fails in this, the sale will be held invalid on the application of the party aggrieved.<sup>339</sup> Where property is conveyed by a debtor to his creditor, with a power to sell and dispose of it, and apply the property to the payment of the debt, the creditor, in executing such power, becomes the trustee of the debtor, and is bound to act bona fide, and to adopt all reasonable modes of proceeding in order to render the sale most beneficial to the debtor, like any other

<sup>335</sup> *Boynton v. Payrow*, 67 Me. 587; *Briggs v. Oliver*, 68 N. Y. 336, 339; *Vaupeil v. Woodward*, 2 Sandf. Ch. (N. Y.) 143; *Stokes v. Frazier*, 72 Ill. 428; *Sitgreaves v. Farmers' & Mechanics' Bank*, 49 Pa. St. 359; *Robinson v. Hurley*, 11 Iowa, 410; *Arendale v. Morgan*, 5 Sneed (Tenn.) 703.

<sup>336</sup> *Durant v. Einstein*, 5 Rob. (N. Y.) 423; *Conyngham's Appeal*, 57 Pa. St. 474.

<sup>337</sup> *Carter v. Wake*, 4 Ch. Div. 605.

<sup>338</sup> *Nelson v. Wellington*, 5 Bosw. (N. Y.) 178; *Goldsmidt v. Trustees of First Methodist-Episcopal Church in Worthington*, 25 Minn. 202; *Chapman v. Gale*, 32 N. H. 141.

<sup>339</sup> If the subject of a pledge is divisible, and the pledgee sells more than is necessary to satisfy the debt, he is liable in damages to the pledgor. The pledgor's acceptance of the surplus of such sale will not defeat his right to recover such damages, and the measure of damages is the difference between the price for which the excess was sold and the price necessarily paid by the pledgor to replace it. *Fitzgerald v. Blocher*, 32 Ark. 742.

agent, factor, or trustee to sell.<sup>340</sup> So, like other trustees, he cannot himself directly become the purchaser, or do the same thing through the agency of another.<sup>341</sup> The pledgor may, however, ratify such a sale, as in other cases.<sup>342</sup>

#### *Sale under Statutes.*

In a number of states sales of pledged property have been made the subject of statutory regulation.<sup>343</sup> Some of these statutes provide an additional mode of selling the pledge, while others take away the power to sell at common law, or under a power of sale, and leave only the statutory method.

### TERMINATION OF PLEDGE.

#### 36. A pledge may be terminated inter alia,—

- (a) By redelivery to pledgor (p. 171).
- (b) By payment or performance (p. 173).
- (c) By tender (p. 175).
- (d) By sale by the pledgee (p. 176).
- (e) By conversion by the pledgee at the pledgor's option (p. 176).

A pledge may be terminated at any time by the pledgee releasing the pledged property,<sup>344</sup> or by an agreement of the parties that the

<sup>340</sup> Howard v. Ames, 3 Metc. (Mass.) 308, 311.

<sup>341</sup> Fitzgerald v. Blocher, 32 Ark. 742, 747.

<sup>342</sup> Stokes v. Frazier, 72 Ill. 428; Chouteau v. Allen, 70 Mo. 290; Hill v. Finigan, 62 Cal. 426; Childs v. Hugg, 41 Cal. 519.

<sup>343</sup> Arizona, Comp. Laws 1877, §§ 3618, 3619. California, Civ. Code, §§ 3005, 3008; St. 1886, §§ 3000, 3001. Dakota, Civ. Code, §§ 1771-1782. Connecticut, Act 1875, c. 82; Acts 1877, c. 126. Georgia, Code 1873, § 2140. Louisiana, Rev. Civ. Code 1870, p. 376, art. 3165. Maine, Acts 1875, c. 53. Massachusetts, Gen. St. 1860, p. 767, §§ 9-11; Pub. St. 1882, c. 192, §§ 10-12. Missouri, Rev. St. 1879, § 6469; Laws 1879, p. 162, § 2. New Hampshire, Gen. Laws 1878, p. 333, §§ 3-8. New Jersey, Revision 1877, p. 812, §§ 3-5. Rhode Island, Pub. St. 1882, c. 90, § 4. Tennessee, Acts 1879, c. 100, § 4. Texas, Rev. St. 1879, p. 499, §§ 3499-3508. Virginia, Code 1873, p. 334, § 44.

<sup>344</sup> The pledgee of goods loses his lien thereon by surrendering possession of them to a third person and taking from him a written guaranty of the debt. But such third person acquires a new lien on such goods, not only for the security of his own debt, but as an indemnity against the liability which he

pledge shall terminate. Death of either pledgor or pledgee does not terminate the pledge,<sup>845</sup> nor does the bankruptcy of the pledgor.<sup>846</sup>

*Redelivery to Pledgor.*

The continued possession of the pledgee is necessary for the existence of a pledge, and a redelivery to the pledgor will terminate it.\* But such a redelivery for a mere temporary purpose, as for shoeing a horse which has been pledged and is owned by the farrier, or for repairing a carriage which has been pledged and is owned by the

incurs to the pledgee, provided the pledgor, who is indebted to him, consents to the transaction when it is made, or ratifies it afterwards. And, when the pledgor was absent when the transaction took place, but, on being informed of it the next day, expressed his gratification with the arrangement, this is a sufficient ratification thereof. *Treadwell v. Davis*, 34 Cal. 601. Where stock is held as collateral security for the payment of a promissory note, which is indorsed by a third person, and the holder, without the consent of the original owner of the stock, releases the indorser for the purpose of making him a witness in a suit in equity by such owner for the recovery of the stock, the stock will be thereby released, and cannot be held for the purpose of enforcing payment of the note. *Denny v. Lyon*, 38 Pa. St. 98. Securities pledged to a trust company as collateral to its indorsements, and subsequently, with the assent of the managing officer of that company, rehypothecated to secure new loans, cannot be reclaimed by the original pledgee as security for its indorsements, but may be redeemed by it from the second pledgee, and held as against the pledgor. *Manhattan Trust Co. v. Sioux City & N. R. Co.* (Cir. Ct.) 65 Fed. 559.

<sup>845</sup> Unless the pledgor had only a life interest in the property pledged. *Hoare v. Parker*, 2 Term R. 376.

<sup>846</sup> *Jerome v. McCarter*, 94 U. S. 734; *Yeatman v. Savings Inst.*, 95 U. S. 764; *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208; *Dowler v. Cushwa*, 27 Md. 354. Where a deposit with a correspondent has, long prior to the commission of an act of insolvency by a national bank, been pledged to secure loans made to the insolvent by its correspondent, neither the subsequent insolvency of the bank nor the appointment of a receiver destroys the lien of the correspondent on the deposit. *Bell v. Hanover Nat. Bank* (Cir. Ct.) 57 Fed. 821.

\* *Fletcher v. Howard*, 2 Alkens (Vt.) 115; *Grinnell v. Cook*, 3 Hill (N. Y.) 485; *Look v. Comstock*, 15 Wend. (N. Y.) 244; *Black v. Bogert*, 65 N. Y. 601; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467; *Walker v. Staples*, 5 Allen (Mass.) 34; *Holmes v. Crane*, 2 Pick. (Mass.) 607, 610; *Bonsey v. Amee*, 8 Pick. (Mass.) 236, 237; *Jarvis v. Rogers*, 15 Mass. 389; *Kimball v. Hildreth*, 8 Allen (Mass.) 167; *Beeman v. Lawton*, 37 Me. 543; *Collins v. Buck*, 63 Me. 459; *Treadwell v. Davis*, 34 Cal. 601; *Russell v. Fillmore*, 15 Vt. 130, 135.

carriage maker, does not amount to an interruption of the pledgee's possession. The owner is but a mere special bailee for the creditor.† So, when the debtor is employed in the creditor's service, his temporary use of the pledged article in the creditor's business does not effect a restoration of the possession to the debtor. In *Reeves v. Capper*,‡ a sea captain pledged his chronometer for a debt. He was afterwards employed by the pledgee as master of one of his ships, and the chronometer was placed in his charge, to be used on the voyage. It was held that the possession of the pledge was not lost. The pledgee recovered the chronometer against a person to whom the master pledged it a second time. In these cases of redelivery to the pledgor for a special and temporary purpose, it is well established that the pledgor may, for such special purpose, hold the possession as agent of the pledgee. Some of the courts and text writers have gone so far as to say that there might be a redelivery to the pledgor to hold the pledged goods generally, as agent of the pledgee. Such a redelivery may not divest the pledgee's rights against the pledgor, but possession so held cannot be good against third persons acquiring rights without notice, and no case can be found which so decides. But on the contrary, such attempts to make the pledgor agent to take and keep the property for the pledgee have, in a number of cases, been held void as against the rights of others acquired on the strength of the pledgor's possession.\*\*

† *Casey v. Cavaroc*, 96 U. S. 467; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248; *Way v. Davidson*, 12 Gray (Mass.) 465; *Macomber v. Parker*, 14 Plck. (Mass.) 497; *Thayer v. Dwight*, 104 Mass. 254; *Walker v. Staples*, 5 Allen (Mass.) 34, 35; *Hutton v. Arnett*, 51 Ill. 198; *Cooper v. Ray*, 47 Ill. 53; *Martin v. Reid*, 11 C. B. (N. S.) 730. But see *Bodenhammer v. Newsom*, 5 Jones (N. C.) 107.

‡ 5 Bing. N. C. 136.

\*\* *First Nat. Bank v. Nelson*, 38 Ga. 391; *Calhoun v. Bank*, 42 S. C. 357, 20 S. E. 153; *Geddes v. Bennett*, 6 La. Ann. 516, *Conger v. City of New Orleans*, 32 La. Ann. 1250; *Fletcher v. Howard*, 2 Aikens (Vt.) 115; *Day v. Swift*, 48 Me. 368; *Shaw v. Wilshire*, 65 Me. 485; *Barrett v. Cole*, 4 Jones (N. C.) 40; *Smith v. Sasser*, Id. 43; *Bodenhammer v. Newsom*, 5 Jones (N. C.) 107; *Treadwell v. Davis*, 34 Cal. 601. Compare *Martin v. Reid*, 11 C. B. (N. S.) 750; *Johnson v. Smith*, 11 Humph. (Tenn.) 396 (dictum); *Cooper v. Ray*, 47 Ill. 53; *Wyeth v. National Market Bank of Brighton*, 132 Mass. 597; *Citizens' Nat. Bank of Baltimore v. Hooper*, 47 Md. 88. But see *Ex parte Fitz*, 2 Lowell, 519, Fed. Cas. No. 4,837.



*Payment or Performance.*

The normal way of putting an end to a pledge is by the performance by the pledgor of the engagement secured. When the pledge is to secure a debt, payment of the debt and any expenses incurred will terminate the pledge and discharge the lien.<sup>347</sup> If the pledgee sues on the debt, and his judgment is satisfied by the sale on execution of other property, this is such a payment as terminates the pledge.<sup>348</sup>

*Same—Application of Payments.*

When more than one debt is secured by the same pledge, questions sometimes arise as to how payments shall be applied, especially in cases of involuntary payment. If the debts were contracted at divers times upon the security of the same pledge, so that the debtor had pledged for the last debts what should remain of the pledge after payment of the first, the moneys arising from the pledges would, in this case, be applied, in the first place, to the discharge of the debt of the oldest standing.<sup>349</sup> When the pledgor makes a payment, he may direct its application to whatever indebtedness he sees fit.<sup>350</sup> If he neglects to make such an application, the pledgee may do so.<sup>351</sup>

<sup>347</sup> As to what constitutes payment, see *Clark*, Cont. 629; *Cross v. Eureka L. & Y. Canal Co.*, 73 Cal. 302, 14 Pac. 885; *Gilpen v. Leksell*, 54 Kan. 674, 39 Pac. 176; *Callanan v. Smart*, 60 Iowa, 305, 14 N. W. 328; *Ward v. Ward*, 37 Mich. 253; *Merrifield v. Baker*, 9 Allen (Mass.) 29; *Lapping v. Duffy*, 65 Ind. 229; *Compton v. Jones*, 65 Ind. 117; *Bacon v. Lamb*, 4 Colo. 578; *Strong v. Wooster*, 6 Vt. 536.

<sup>348</sup> A pledgee may, by his misconduct with respect to the thing pledged, become liable to the pledgor for depreciation or loss in value in consequence of his negligence, but when the value of the thing pledged is lost through the negligence of the pledgee, it does not operate, ipso facto, as a satisfaction or extinction of the debt to the extent of the loss. *Cooper v. Simpson*, 41 Minn. 46, 42 N. W. 601. Money collected by a creditor on a note received as collateral security, which the creditor has power to convert into money, operates, pro tanto, as payment of the secured debt. *Hunt v. Nevers*, 15 Pick. (Mass.) 500.

<sup>349</sup> *Jones v. Benedict*, 83 N. Y. 79.

<sup>350</sup> *Clark*, Cont. p. 634, and cases cited.

<sup>351</sup> *Wilcox v. Fairhaven Bank*, 7 Allen (Mass.) 270; *Pattison v. Hull*, 9 Cow. (N. Y.) 747.

*Same—Subrogation of Sureties of Pledgor.*

It is an established rule of equity that a surety who has paid the debt of his principal, either voluntarily or by compulsion, is entitled, for his indemnity, to any property pledged or collateral security given therefor by the principal to the creditor. But, as this rule is founded on the principles of reason and justice, and not upon any contract or stipulation to that effect between the parties, it follows, as a necessary consequence, that a surety is not to be substituted in the place of the creditor, unless, from the circumstances of the case, it is shown that it is just and reasonable that he should be. Hence, it is obvious that, in order to become entitled to such substitution, he must first pay the whole of the debt or debts for which the property is mortgaged or the collateral security is given to the creditor; for it would be manifestly unjust, and a plain violation of his rights, to compel him to relinquish any portion of the property before the obligation for the performance of which it was conveyed to him as security had been fully kept and complied with.<sup>352</sup> Such previous payment by the surety is alike essential where there is only one debt and one surety, and where there are many debts, all of which are equally protected and secured by the property pledged, and many several sureties of the several debts; for the chief and primary object of a pledge to a creditor is his benefit, protection, and advantage in reference to each and all of the several debts which it was made or given to secure. And, until this object is fully accomplished, no surety can justly or lawfully interfere to disturb him in the possession of the property pledged, or hinder him from appropriating the proceeds of it towards payment of any such debt which he cannot otherwise collect or render available. And if there be one or more debts thus secured for which the debtor alone is responsible, and the amount of which cannot be obtained from him on account of his insolvency or pecuniary inability, such proceeds may be applied, as far as is necessary for that purpose, to the payment and discharge of such debts, and to that extent the sureties upon notes constituting other debts can have no interest in or right to the pledged prop-

<sup>352</sup> *Richardson v. Washington Bank*, 3 Metc. (Mass.) 536, 541; *Copis v. Middleton*, 1 Turn. & R. 224; *Hodgson v. Shaw*, 3 Mylne & K. 183; *Wilcox v. Fairhaven Bank*, 7 Allen (Mass.) 270.

erty. But the several sureties, or any one of them, may, if they choose to do so, pay all the debts secured by pledge, and then be, or they will be entitled to be, substituted in the place of the creditor. If the payment be made by one of them only, he will hold the property, subject to the rights of the others to come in and pay the amount of their respective liabilities, for his own indemnity. If it be made by all of them, the payment will operate as a redemption of the property for their common benefit, and the proceeds will be held to be distributed among them in proportion to the amount of their respective liabilities. But, until the whole of the debts due the creditor, and secured by the pledge, are paid or offered to be paid to him by all, or by some one, of the sureties, he has an undoubted right to the possession and control of the pledged property, and no proceedings can be had against him in reference to its disposal or appropriation.<sup>853</sup>

#### *Tender.*

If a pledgee refuse to deliver the property pledged for the security of his debt, on tender<sup>854</sup> of the amount due, or other performance, and the property being demanded, his special property then ceases, and he becomes a wrongdoer,—is guilty of conversion to his own use, for which the action of trover lies.<sup>855</sup> The tender places the parties, in relation to the property pledged, as though payment of the debt had been made. The pledgee no longer has any lien for the debt, but the parties stand in the same relation as though no pledge had ever been made.<sup>856</sup> The consequence is that, although the debt

<sup>853</sup> *Wilcox v. Fairhaven Bank*, 7 Allen (Mass.) 270.

<sup>854</sup> As to what constitutes a valid tender, see *Clark*, Cont. 639. A mere offer to pay is not a tender. *Lewis v. Mott*, 36 N. Y. 395. Compare *Cummock v. Institution for Savings in Newburyport*, 142 Mass. 342, 7 N. E. 869.

<sup>855</sup> *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, and 15 Pac. 773; *Ball v. Stanley*, 5 Yerg. (Tenn.) 199.

<sup>856</sup> *Haskins v. Kelly*, 1 Rob. (N. Y.) 160; *McCalla v. Clark*, 55 Ga. 52; *Mitchell v. Roberts*, 17 Fed. 776; *Humphrey v. County Nat. Bank of Clearfield*, 113 Pa. St. 417, 6 Atl. 155; *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, and 15 Pac. 773; *Norton v. Baxter*, 41 Minn. 146, 42 N. W. 865; *Hicks v. National Life Ins. Co.*, 9 C. C. A. 215, 60 Fed. 690; *Hyams v. Baumberger*, 10 Utah, 3, 36 Pac. 202. Pledgee is answerable for depreciation in value of pledged property, after he has refused to accept a valid tender of the debt, and a demand for the possession of the property; and this is equal-

remains, for which the pledgee has a right of action, yet the pledgor has a right of action for the pledged property.<sup>357</sup>

*Sale.*

A sale of the pledged property by the pledgee, in any of the ways already pointed out, terminates the pledge. But, as has been stated, if the pledgee attempts to become the purchaser, the pledgor may treat the sale as of no effect and the pledge as continuing.<sup>358</sup>

*Conversion by the Pledgee.*

If the pledgee refuses to redeliver the pledge upon payment or tender, he is guilty of conversion, unless there are circumstances excusing him; for instance, if he has been sued by a third person claiming the pledged property as owner, a refusal to deliver to the pledgor until the rights of the two claimants are settled is not a conversion. For to deliver the property to the pledgor would be a conversion as against the other claimant, if he should establish that he had title to the property.<sup>359</sup> So the pledgee may deliver the pledge to one who is the real owner without becoming liable to the pledgor for conversion, because the real owner has a right to the possession of the property.<sup>360</sup> The measure of damages for a conversion has already been discussed.<sup>361</sup>

ly true whether an action is brought against him as for a conversion, or a bill is filed against him to redeem from the pledge. *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, and 15 Pac. 773.

<sup>357</sup> *Ball v. Stanley*, 5 Yerg. (Tenn.) 199.

<sup>358</sup> Ante, p. 168.

<sup>359</sup> *Cass v. Higenbotam*, 27 Hun (N. Y.) 406, 408.

<sup>360</sup> *The Idaho*, 93 U. S. 575; *Bates v. Stanton*, 1 Duer (N. Y.) 79; *Pitt v. Albritton*, 12 Ired. (N. C.) 74; *Hayden v. Davis*, 9 Cal. 573. But see *Sharpe v. National Bank of Birmingham*, 87 Ala. 644, 7 South. 106.

<sup>361</sup> Ante, p. 160.

## CHAPTER V.

### BAILMENTS FOR MUTUAL BENEFIT—HIRING.

37. Locatio, or Hiring.
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40. Rights and Liabilities of Parties.
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- 42-44. Locatio Operis, or Hire of Labor and Services.
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  - (d) Safe-Deposit Companies.
  - (e) Agisters.
  - (f) Factors and other Bailiffs.
46. Termination of Relation.
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### LOCATIO, OR HIRING.

37. Locatio, or hiring, is a bailment in which compensation is to be given for the use of a thing, or for labor and services about it.



Bailments for hire were called in the Roman law “*locatio*,” or “*locatio-conductio*,” both words being used indifferently to signify the same thing.<sup>1</sup> It is a contract whereby the use of a thing, or the services and labor of a person, are stipulated to be given for a certain reward.<sup>2</sup> Pothier defines it to be a contract by which one of the contracting parties engages to allow the other to enjoy or use the thing hired, during the stipulated period, for a compensation, which the other party engages to pay.<sup>3</sup> A definition substantially the same will be found in other writers.<sup>4</sup> Lord Holt has defined it to be “when goods are left with the bailee to be used by him for hire.”<sup>5</sup> The objection to this, as well as to the definition of Pothier, is that it is incomplete, and covers only cases of the hire of a thing (*locatio rei*), and excludes all cases of the hire of labor and services, and of the carriage of goods. Mr. Bell defines it, with great exactness, thus: “Location is, in general, defined to be a contract, by which the temporary use of a subject, or the work or service of a person, is given for an ascertained hire.”<sup>6</sup> At the common law it may properly enough be defined to be a bailment of a personal chattel, where a compensation is to be given for the use of the thing, or for labor or services about it; or, in other words, it is a loan for hire, or a hiring or letting of goods, or of labor and services, for a reward.<sup>7</sup>

We are accustomed, in the common law, to use words corresponding to those of the Roman law, almost in the same promiscuous manner. Thus, letting (“*locatio*”) and hiring (“*conductio*”) are precise equivalents, used for the purpose of distinguishing the relative situation of different parties to the same contract. The latter, called in the civil law “*locator*,” and in the French law “*locateur*,” “*loueur*,” or “*baillieur*,” is he who, being the owner of the thing, lets it out to

<sup>1</sup> Ayliffe, Pand. bk. 4, tit. 7, p. 460.

<sup>2</sup> Wood, Inst. bk. 3, pp. 235, 236, c. 5; 1 Domat, bk. 1, tit. 4, § 1, art. 1.

<sup>3</sup> Poth. Contrat de Louage, note 1.

<sup>4</sup> 1 Domat, bk. 3, tit. 4, § 1, art. 1. See, also, Code Civil of France, arts. 1709, 1710.

<sup>5</sup> Coggs v. Bernard, 2 Ld. Raym. 909, 913.

<sup>6</sup> 1 Bell, Comm. (4th Ed.) §§ 198, 385; Id. (5th Ed.) pp. 255, 451.

<sup>7</sup> 2 Kent, Comm. lect. 40 (4th Ed.) p. 585; 1 Bell, Comm. (5th Ed.) pp. 255, 451; 1 Bell, Comm. (4th Ed.) §§ 198, 385. See, also, Monthly Law Mag. (London) for April, 1839, pp. 217-219; Story, Bailm. § 363.

another for hire or compensation; and the hirer, called in the civil law "conductor," and in the French law "conducteur," "preneur," "locataire," is he who pays the compensation, having the benefit of the use of the thing.<sup>8</sup>

It must be borne in mind that the terms "letter" and "hirer" do not invariably refer to either the bailor or the bailee. The letter is not always the bailor, and the hirer is not always the bailee. Thus, one who procures a horse from a livery stable to ride is the bailee and the hirer, while the livery stable keeper is the bailor and letter. But one who boards his horse at a livery stable is the bailor and hirer, while the livery stable keeper is now the bailee and the letter. The hirer is the one who pays the compensation, and receives the immediate benefit of the bailment.

#### ESTABLISHMENT OF RELATION.

#### 38. Bailments for hire may be created:

(a) By contract (p. 181).

(b) By operation of law (p. 182).

#### 39. In addition to the elements necessarily present in every bailment, bailments for hire must be undertaken in consideration of a recompense.

Bailments for hire differ very little from gratuitous bailments either in their manner of creation, or in their purposes. The sole additional requisite is that the bailment be undertaken or created in consideration of a recompense or price.<sup>9</sup> Thus, in the case of a simple deposit, if a price is to be paid for the keeping, the char-

<sup>8</sup> Story, Bailm. § 369; Wood, Inst. bk. 3, p. 236, c. 5; Poth. Contrat de Louage, note 1; 1 Domat, bk. 1, tit. 4, § 1, art. 2; Heinecc. Pand. lib. 19, tit. 2, § 318; Jones, Bailm. 90; Wood, Inst. Civ. Law, 236.

<sup>9</sup> In every bailment of letting for hire, a price or compensation for the hire is essential. The amount may not be stipulated, but the contract must contemplate payment. *Herryford v. Davis*, 102 U. S. 235. In the absence of an agreement to the contrary, the law implies an agreement to pay a reasonable sum for the use of a thing. *Cullen v. Lord*, 39 Iowa, 302; *Gray v. Missouri River Packet Co.*, 64 Mo. 47.

acter of the bailment is changed. It is no longer a depositum, but becomes a *locatio custodiæ*, or a hiring of custody. So, also, if a loan for use is gratuitous, it is a *commodatum*, but, if it be for a price, it is a *locatio rei*, or the hiring of a thing; and what would be a mandate, if it were not for the consideration, is a hiring of work and labor, or the hiring of carriage. Recompense or no recompense refers, not to the result of the undertaking, but to mutual expectation at the outset.<sup>10</sup>

It is not necessary that a specific price should be expressly agreed on, for it may be tacitly implied. When the labor is to be performed by an artisan, if no express price is agreed on, he is tacitly presumed to engage for the usual price paid for the like service at the same place, according to the general custom of the trade, or, which is the same thing, to pay what it is fairly worth there. So, in cases of hiring the use of a thing, the customary price is, in the absence of all positive engagements, presumed to be that which is agreed to be given; and, if no price is fixed by custom, then a reasonable price is to be allowed.<sup>11</sup>

<sup>10</sup> Schouler, *Bailm.* (2d Ed.) § 98. Where a bailee takes a horse to care for, and is to have the use of the horse in consideration of his keep, the bailment is one for hire. *Chamberlin v. Cobb*, 32 Iowa, 161. See, also, *Francis v. Shrader*, 67 Ill. 272; *White v. Humphery*, 11 Q. B. Div. 43; *Gaff v. O'Neil*, 2 Cin. (Ohio) 246. Where one entering a clothing house for the purchase of a suit deposits his watch, at the direction of the salesman, in a drawer, preparatory to trying on some clothes, the jury are warranted in finding that such deposit is a necessary incident of the business, in which case the clothier becomes a bailee for hire, bound to exercise ordinary diligence. *Woodruff v. Painter*, 150 Pa. St. 91, 24 Atl. 91. A merchant who sells ready-made cloaks at retail, and provides mirrors for the use of customers while trying them on, and clerks to aid in the process, thereby impliedly invites his customers to take off their wraps and lay them down in the store, and is bound to exercise some care over such wraps. Where such merchant provides no place for keeping such wraps, and does not notify customers to look out for their wraps themselves, nor give any direction to his clerks on the subject, he is liable for the loss of a wrap laid on the counter by a customer while trying on a cloak, since his acts show that he exercised no care whatever. *Bunnell v. Stern*, 122 N. Y. 539, 25 N. E. 910; ante, p. 45, "Gratuitous Bailments."

<sup>11</sup> Story, *Bailm.* § 375; Schouler, *Bailm.* (2d Ed.) § 90.

*By Contract.*

It follows naturally from the requirement of a contemplated consideration, to be paid by one party and received by the other, that the great majority of bailments for hire are founded on special contracts.<sup>12</sup> Where this is the case the parties must mutually assent to the same thing in the same sense.<sup>13</sup> Mistake in regard to the subject-matter of the bailment, its purpose, or the recompense, will avoid the contract.<sup>14</sup> Thus, if I agree to hire a certain horse, and the bailor understands me to mean a different horse, there is no contract, for there is no mutual assent.<sup>15</sup> Fraud or duress renders the contract voidable.<sup>16</sup> The contract of hire may, of course, be either express or implied. As to the competency of parties, the usual rules apply. These have been already considered.<sup>17</sup> The contract must not involve the execution of an unlawful purpose, or be against good morals and public policy. Thus, a contract for a bailment of furniture to be used for purposes of prostitution is void. So, also, are contracts to supply tools to commit burglary with, or goods to aid a public enemy, or for the purpose of smuggling. One of the most frequent instances in which this question arises is where a horse has been hired for use on Sunday. In such cases the right of either party to redress for any loss or injury depends upon whether he can make out a case without relying upon the illegal contract. If he can, he may recover, though such illegality may incidentally appear.<sup>18</sup> "The illegal letting may or may not appear. If it does, it simply explains the defendant's possession, and proves that it was by the owner's permission, at least for a certain purpose. It may give the defendant an opportunity to injure the horse, but it does not cause the injury; nor does it con-

<sup>12</sup> Story, Bailm. § 372; Schouler, Bailm. (2d Ed.) § 91.

<sup>13</sup> Schouler, Bailm. (2d Ed.) § 91; 2 Schouler, Pers. Prop. § 471; Story, Bailm. § 378.

<sup>14</sup> Clark, Cont. 289.

<sup>15</sup> Schouler, Bailm. (2d Ed.) § 91.

<sup>16</sup> Clark, Cont. 346.

<sup>17</sup> Ante, p. 16.

<sup>18</sup> Story, Bailm. § 379; Schouler, Bailm. (2d Ed.) § 92.

<sup>19</sup> Schouler, Bailm. (2d Ed.) § 140; Hall v. Corcoran, 107 Mass. 251; Stewart v. Davis, 31 Ark. 518.

tribute to it, in such a sense as to make the plaintiff a party to the wrongful act. If it does not appear, before the defendant can avail himself of it as a defense, it becomes necessary for him to prove the illegal contract to which he was a party, and his own illegal conduct in traveling upon the Sabbath. But he can no more avail himself of that as a defense than the plaintiff can as a cause of action. Either party whose success depends upon proving his own violation of law must fail.”<sup>20</sup>

*By Operation of Law.*

Though the great majority of bailments for hire rest upon contract between the parties, there are a few classes of quasi bailments for hire which may arise independently of the bailor's consent.<sup>21</sup> Such are cases of possession of property by captors,<sup>22</sup> by revenue officers,<sup>23</sup> by prize agents,<sup>24</sup> by officers of courts,<sup>25</sup> and by

<sup>20</sup> Frost v. Plumb, 40 Conn. 111, 113.

<sup>21</sup> “Nor should it be thought that bailments for mutual benefit necessitate a contract and mutual terms. \* \* \* There may exist what we call a ‘quasi bailment,’ namely, one whose conditions are satisfied with the voluntary acceptance of possession by one who expects a reward for his service.” Schouler, Bailm. (2d Ed.) § 94. The acceptance may be either actual or constructive, but unless there is something to show bailment, knowledge, and intent, no bailment can be inferred. Schouler, Bailm. (2d Ed.) § 100; Spangler v. Eicholtz, 25 Ill. 297; Cox v. Reynolds, 7 Ind. 257; Rodgers v. Stophel, 32 Pa. St. 111; Feltman v. Gulf Brewery, 42 How. Prac. 488.

<sup>22</sup> Story, Bailm. § 614; The Betsey, 1 W. Rob. Adm. 93, 96. Captors are bound to exercise ordinary care. The Maria, 4 W. Rob. Adm. 348, 350; The Anne, 3 Wheat. 435; The George, 1 Mason, 24, Fed. Cas. No. 5,328; The Lively, 1 Gall. 315, Fed. Cas. No. 8,403.

<sup>23</sup> Burke v. Trevitt, 1 Mason, 96, 101, Fed. Cas. No. 2,163.

<sup>24</sup> Story, Bailm. § 619; The Rendsberg, 6 C. Rob. Adm. 142.

<sup>25</sup> Story, Bailm. §§ 124-135, 620. See, generally, Burke v. Trevitt, 1 Mason, 96, 101, Fed. Cas. No. 2,163; Browning v. Hanford, 5 Hill (N. Y.) 588, 592; Trotter v. White, 26 Miss. 88, 93. Ordinary diligence is the measure of liability. Cross v. Brown, 41 N. H. 283; Blake v. Kimball, 106 Mass. 115; Aurentz v. Porter, 56 Pa. St. 115; Burke v. Trevitt, 1 Mason, 96, Fed. Cas. No. 2,163; The Rendsberg, 6 C. Rob. Adm. 142. The same rules apply to receivers and other depositaries appointed by courts. Story, Bailm. § 621; Knight v. Plimouth, 3 Atk. 480; Beauchamp v. Silverlock, 2 Rep. Ch. 5; Horsely v. Chaloner, 2 Ves. Sr. 83; Rowth v. Howell, 3 Ves. 566; Wren v. Kirton, 11 Ves. 377.



salvors.<sup>26</sup> All these are treated as quasi bailees, or depositaries for hire.<sup>27</sup>

*General Requisites.*

It is unnecessary to enumerate at length all the requisites of bailments for hire. With the exception of the recompense, they are the same as in the case of gratuitous bailments. The subject-matter must, of course, be personal property, but it may be either corporeal or incorporeal.<sup>28</sup> It must, however, be in esse. A chattel not in existence cannot be the subject-matter of a present undertaking for hire.<sup>29</sup> There must, of course, be a delivery and a contemplated redelivery, or delivery over, at the termination of the bailment.<sup>30</sup> The contract of hire does not itself constitute a bailment. The bailment has its inception only when the contract is consummated by a delivery in accordance with its terms.<sup>31</sup> Until delivery, there is no bailment, but, at most, only a right to a bailment.<sup>32</sup> The delivery may be contemporaneous with the contract, or subsequent thereto. The parties, however, acquire mutual rights and liabilities as soon as the contract is made. Both parties are bound, and either is liable for breach of contract if he fails to carry out his part of the agreement. In other words, either party is liable for nonfeasance.<sup>33</sup> Delivery and acceptance may be actual or

<sup>26</sup> Salvors are entitled to compensation for their services. This compensation is called "salvage," and renders the bailment one for hire. Story, Bailm. § 622; Abbott, Shipp. (5th Ed.) pt. 3, c. 10, §§ 1, 2; In re Cargo ex Schiller, 2 Prob. Div. 145.

<sup>27</sup> Schouler, Bailm. (2d Ed.) § 94. See, also, Witowski v. Brennan, 41 N. Y. Super. Ct. 284; Phelps v. People, 72 N. Y. 334; Cross v. Brown, 41 N. H. 283.

<sup>28</sup> Ante, p. 10.

<sup>29</sup> Story, Bailm. § 373; Schouler, Bailm. (2d Ed.) § 89.

<sup>30</sup> Ante, p. 10.

<sup>31</sup> Ante, p. 13.

<sup>32</sup> Schouler, Bailm. p. 102. See, also, Elsee v. Gatward, 5 Term R. 143; Thorne v. Deas, 4 Johns. 84.

<sup>33</sup> Story, Bailm. §§ 384, 436; 2 Kent, Comm. 570; Schouler, Bailm. (2d Ed.) § 100. See Thorne v. Deas, 4 Johns. (N. Y.) 84; Elsee v. Gatward, 5 Term R. 143; Balfe v. West, 13 C. B. 466. "In cases of nondelivery of the thing by the letter, whether it arises from his mere refusal, or from his subsequent sale or transfer thereof to another person, or from his having stipulated for the delivery of a thing of which he is not the owner, and over which he has

constructive, and may be through the medium of agents. The parties may act in a personal or representative capacity.<sup>34</sup>

*End Tues Jan 21st.*

#### RIGHTS AND LIABILITIES OF PARTIES.

40. With respect to the rights and liabilities of the parties thereto, bailments for hire may, for convenience of treatment, be divided into two classes, viz.:

- (a) *Locatio rei*, or hire of things (p. 184).
- (b) *Locatio operis*, or hire of labor and services in regard to things (p. 212).

#### SAME—LOCATIO REI, OR HIRE OF THINGS FOR USE.

41. Where things are hired for use the rights and liabilities of the parties are controlled primarily by the contract of hiring. But, unless varied by the special contract, the normal rights and liabilities of the parties are as follows:

- (a) A bailee is entitled to use the property during the time, for the purpose, and in the manner for which it was hired, and only for such time, purpose, and in such manner (p. 186).
- (b) The bailee acquires a special property in the thing hired, while the general ownership remains in the bailor. Either party may maintain an action against

not any control, a right of action accrues to the hirer. But by the French law, if the nondelivery is prevented by inevitable casualty or superior force, as if it perishes, no such action lies; for in that law the rule is, 'Impossibilium nulla obligatio est.' But in all these cases the hirer may, if he chooses, treat the contract as rescinded; and, if he has paid any consideration therefor, he may recover it back. On the other hand, if the letter offers to deliver the thing in an injured or broken or altered state from what it was at the time of the hiring, the hirer is not bound to receive it, but he is entitled to insist upon rescinding the contract. And in such a case it will make no difference whether the injury or deterioration was by inevitable accident, or by any other cause." Story, Bailm. § 384.

<sup>34</sup> Ante, p. 18.

the third person for any tortious interference with the property (p. 196).

- (c) Where bailments for hired use are not personal to the bailee, the bailee has an assignable interest in the property hired (p. 197).
- (d) The bailor warrants the title and right of possession (p. 199).
- (e) The bailor must warn the bailee of any defects in the thing hired which render it unsuitable and dangerous for the bailment purpose (p. 199).
- (f) The bailee alone is liable for injuries to third persons caused by his negligent use of the property (p. 200).
- (g) Ordinary and incidental expenses of caring for the property must be borne by the bailee; extraordinary, by the bailor (p. 200).
- (h) The bailee must exercise ordinary care and diligence in the use of the thing hired (p. 201).
- (i) The bailee is liable for the injurious acts of those whom he voluntarily permits to use the thing hired (p. 204).
- (j) The bailee must deliver up the thing hired at the termination of the bailment (p. 209).
- (k) The bailee must make compensation in accordance with the agreement (p. 210).

As in all other classes of bailments, the parties may determine for themselves the extent of their mutual rights and liabilities. Any special contract, not against public policy or in violation of law, will be enforced.<sup>35</sup> The bailor may limit the time, manner, and place in which the thing hired may be used,<sup>36</sup> and the bailee may undertake to insure the safe return of the goods. But, as before stated, the liabilities of a bailee will not be enlarged, or his rights limited, by words of doubtful import. The special agreement must be clearly proved.<sup>37</sup>

<sup>35</sup> Ante, p. 10.

<sup>36</sup> Post, p. 186.

<sup>37</sup> Ante, p. 28.

*Right to Use.*

The hirer also acquires the right, and the exclusive right, to the use of the thing during the time of the bailment, and the owner has no right to disturb him in the lawful enjoyment of it during this time.<sup>38</sup> Nor can a creditor of the bailor, during the term of hire, attach the property, and take it from the custody of the bailee.<sup>39</sup> And if, during that time, the thing is redelivered to the owner for a temporary purpose only, he is bound to deliver it back afterwards to the hirer.<sup>40</sup>

*Same—Liability for Misuser.*

There is, on the part of the hirer, an implied obligation not only to use the thing with due care and moderation, but also not to apply it to any other use than that for which it is hired.<sup>41</sup> Thus, if a horse is hired as a saddle horse, the hirer has no right to use the horse in a cart, or to carry loads, or as a beast of burden.<sup>42</sup> So, if a carriage and horses are hired for a journey to Boston, the hirer has no right to go with them on a journey to New York.<sup>43</sup> So, if horses are hired for a week, the hirer has no right to use them for a month.<sup>44</sup> So, in the absence of any agreement as to the number of persons who are to ride in a hired carriage, the hirer is au-

<sup>38</sup> Story, Bailm. § 395; *Hickok v. Buck*, 22 Vt. 149.

<sup>39</sup> *Hartford v. Jackson*, 11 N. H. 145. Lessee has a right to property leased during lease, paramount to any right of lessor or his creditors; and, in enjoyment of this right, they cannot disturb him with impunity. They cannot take the property out of his possession. *Smith v. Niles*, 20 Vt. 315.

<sup>40</sup> *Roberts v. Wyatt*, 2 Taunt. 268.

<sup>41</sup> Story, Bailm. § 413. Compare "Gratuitous Loans," ante, p. 89. And see *Cullen v. Lord*, 39 Iowa, 302; *Kennedy v. Ashcraft*, 4 Bush (Ky.) 530; *Stewart v. Davis*, 31 Ark. 318; *Martin v. Cuthbertson*, 64 N. C. 328.

If hiring be general, any prudent use of the thing is permissible. *Horne v. Meakin*, 115 Mass. 326; *McLauchlin v. Lomas*, 3 Strobbh. (S. C.) 85; *Harrington v. Snyder*, 3 Barb. (N. Y.) 380.

<sup>42</sup> *Jones*, Bailm. 68, 88. See *Wilbraham v. Snow*, 2 Saund, 47a, 47g, and note; *Lockwood v. Bull*, 1 Cow. (N. Y.) 322; *McNeill v. Brooks*, 1 Yerg. (Tenn.) 73.

<sup>43</sup> *Jones*, Bailm. 68. And see *Coggs v. Bernard*, 2 Ld. Raym. 909, 915; *Rotch v. Hawes*, 12 Pick. (Mass.) 136; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Wheelock v. Wheelwright*, 5 Mass. 104.

<sup>44</sup> *Jones*, Bailm. 68; *Coggs v. Bernard*, 2 Ld. Raym. 909, 915. And see *Wheelock v. Wheelwright*, 5 Mass. 104; *Stewart v. Davis*, 31 Ark. 518.

thorized to carry such number only as the vehicle was made for; not exceeding, of course, the ordinary load adapted to the team drawing the same.<sup>45</sup> And it may be generally stated that if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but, if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor.<sup>46</sup> In short, such misuser is deemed at the common law a conversion of the property, for which the hirer is generally held responsible to the letter, to the full extent of his loss.<sup>47</sup> So, if a bailee for hire of a thing for a limited period should sell the thing, the bailment would be ended, and a suit might be maintained against him by the bailor for a tortious conversion thereof.<sup>48</sup>

The general rule and weight of authority are unquestionably as above stated. The early cases were especially stringent in the liability they imposed upon a bailee who violated or exceeded the terms

<sup>45</sup> *Harrington v. Snyder*, 3 Barb. (N. Y.) 380.

<sup>46</sup> *De Tollenere v. Fuller*, 1 Mill. Const. (S. C.) 117, 121; *Jones*, Bailm. 68, 69, 121; *Coggs v. Bernard*, 2 Ld. Raym. 909, 917; *Buchanan v. Smith*, 10 Hun (N. Y.) 474; *Fisher v. Kyle*, 27 Mich. 454; *Lane v. Cameron*, 38 Wis. 603. *Ray v. Tubbs*, 50 Vt. 688. Where a horse meets with an injury through his own fault, but while the bailee is misusing it, the bailee is liable. *Lucas v. Trumbull*, 15 Gray (Mass.) 306. An infant is not liable on a contract of hire, but, if he uses the property in any other than the stipulated way, he is liable for conversion. *Jennings v. Randall*, 8 Term. R. 335; *Homer v. Thwing*, 3 Pick. (Mass.) 492. Cf. *Whelden v. Chappel*, 8 R. I. 230.

<sup>47</sup> Bac. Abr. "Bailment," C; Id. "Trover," C, D, E; *Wilbraham v. Snow*, 2 Saund. 47a, 47f, 47g, note by Williams & Patteson; *Isaack v. Clark*, 2 Bulst. 306, 309; *Wilkinson v. King*, 2 Camp. 335; *Loeschman v. Machin*, 2 Starkie, 311; *Youl v. Harbottle*, Peake, 49; *Rotch v. Hawes*, 12 Pick. (Mass.) 136; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Wheelock v. Wheelwright*, 5 Mass. 104; *Cooper v. Willomatt*, 1 Man., G. & S. 672; *Harrington v. Snyder*, 3 Barb. (N. Y.) 380; *Crocker v. Gullifer*, 41 Me. 491; *Cobb v. Wallace*, 5 Cold. 539; *Wentworth v. McDuffie*, 48 N. H. 402.

<sup>48</sup> *Sargent v. Gile*, 8 N. H. 325; *Lovejoy v. Jones*, 30 N. H. 164; *Swift v. Moseley*, 10 Vt. 208; *Sanborn v. Colman*, 6 N. H. 14; *Johnson v. Willey*, 46 N. H. 75; *Rodgers v. Grothe*, 58 Pa. St. 414; *Cooper v. Willomatt*, 1 C. B. 672; *Marnier v. Bankes* (C. P.) 16 Wkly. Rep. 62. But a bailee may have an assignable interest. See, post, p. 197.



of the bailment. By these decisions the slightest intentional violation of the terms of the contract was regarded as a conversion, and the bailee was held liable for any loss thereafter happening, though caused by inevitable accident, and though it would have happened even had there been no violation of the terms of the bailment. The tendency of the more modern decisions, however, is towards a less strict liability. Of course, there is no difficulty in cases where it can be shown that the bailee's misconduct caused the loss. In such cases his liability is clear. But where the loss was caused by inevitable accident, or would have occurred even if he had not been guilty of any misconduct, the question is not free from difficulty, and the authorities are not in accord. The question turns upon what acts will amount to a conversion. It is only when the bailee has converted the property that absolute liability, regardless of fault, attaches. Conversion is based upon the idea of an assumption by the defendant of a right of property, or a right of dominion over the thing converted, which casts upon him all the risks of an owner.<sup>49</sup> By the act of conversion the real owner immediately acquires a right of action against the wrongdoer for the value of the thing converted.<sup>50</sup> Satisfaction by the defendant of the judgment obtained for such value vests the title to the property in him by relation, as of the time of conversion.<sup>51</sup>

"The distinction between acts of trespass, acts of misfeasance, and acts of conversion is often a substantial one. In actions in the nature of trespass or case for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but, in actions in the nature of trover, the general rule of damages is the value of the property at the time of the conversion, diminished, when the property has been returned to and received by the owner, by the value of the property at the time it was returned, so that after the conversion, and until the delivery to the owner, the property is absolutely at the risk of the person who has converted it; and he is liable to pay for any depreciation in value, whether that depreciation has been occa-

<sup>49</sup> *Spooner v. Manchester*, 133 Mass. 270.

<sup>50</sup> *Suth. Dam.* § 7; *Sedg. Dam.* § 5.

<sup>51</sup> *Spooner v. Manchester*, 133 Mass. 270, 273.

sioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or the act of God."<sup>52</sup>

This right of an owner to recover as damages the value of the property converted is itself regarded as in the nature of property.<sup>53</sup> It vests in him the instant the wrong is committed. The subsequent verdict and judgment merely define its extent.<sup>54</sup> It is protected by the ordinary constitutional guaranties, and he cannot be deprived of it without his consent.<sup>55</sup>

*Same—What Constitutes Conversion.*

It is not every wrongful detention of personal property that amounts to a conversion.<sup>56</sup> Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting, or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property, and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant, in withholding it, claims the right to withhold it, which is a claim of a right of dominion over it.<sup>57</sup> Thus, in an action for conver-

<sup>52</sup> *Spooner v. Manchester*, 133 Mass. 270. See, also, *Perham v. Coney*, 117 Mass. 102. Where horses were loaned to be used in O., and the bailee sent them to V., where they became sick and died, it was held that the right to use the thing bailed is strictly confined to the use expressed in the transaction, and the borrower, by any excess, makes himself responsible for the loss, although it be by some inevitable casualty. *Lane v. Cameron*, 38 Wis. 603.

<sup>53</sup> 2 Bl. Comm. 438.

<sup>54</sup> *Suth. Dam.* § 7; *Sedg. Dam.* § 5.

<sup>55</sup> *Suth. Dam.* § 7; *Cooley*, Const. Lim. 449; *Westervelt v. Gregg*, 12 N. Y. 211; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477; *Streubel v. Milwaukee & M. R. Co.*, 12 Wis. 67; *Thornton v. Turner*, 11 Minn. 336 (Gil. 237).

<sup>56</sup> "A conversion consists in an illegal control of the thing converted inconsistent with the plaintiff's right of property." *Perley, J.*, in *Woodman v. Hubbard*, 25 N. H. 67, 71. See, also, *Spooner v. Holmes*, 102 Mass. 503, collecting cases.

<sup>57</sup> *Spooner v. Manchester*, 133 Mass. 270; *Wilson v. McLaughlin*, 107 Mass. 587; *Simmons v. Lillystone*, 8 Exch. 431. In *Fouldes v. Willoughby*, 8 Mees.

sion of a horse, it appeared that defendant had hired the horse for a journey, and had carried, in addition to his own weight, \$2,000 in specie, weighing 160 pounds. The court said: "If, however, an excessive weight be put on the horse, it will not amount to a conversion, but will be an abuse of the animal, for which, if injured by it, the owner may recover damages in an action on the case. By the contract of hiring, the hirer is bound to use the horse in a moderate and prudent manner. If the hiring be to ride, he must not ride immoderately; if to work, he must not work the animal unreasonably,—or, in either case, he will be liable, in action on the case, for the damages resulting from his misconduct, but not for a conversion, because the immoderate use of the animal during the time and in the mode stipulated by the contract does not amount to the assertion of ownership and of a right distinct and different from that acquired by the contract. It may have resulted from ignorance or carelessness, without any design whatever to exceed the authority given by the owner. But when a hirer appropriates the horse to a use entirely different from the one for which he was hired, as if he ride him to a different place, or, if hired to ride, put him in a wagon, he thereby assumes an authority entirely distinct from and independent of that conferred by the contract, and usurps the character of owner. He does not an act which he had authority to do, in an unreasonable and injurious manner, but an act wholly unauthorized by the license of the owner, and is therefore guilty of a conversion." <sup>58</sup>

& W. 540, 547 (a leading case), it is said, "In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them by himself, or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner."

<sup>58</sup> *McNeill v. Brooks*, 1 Yerg. (Tenn.) 73. In *Swift v. Moseley*, 10 Vt. 208, 210, Redfield, J., said, "If the thing be put to a different use from that for which it was bailed, the bailor may maintain trespass or trover," but that "any misuser or abuse of the thing bailed, in the particular use for which the bailment was made, will not enable the general owner to maintain trespass or trover against the bailee." The proposition is perhaps stated too broadly. In *Wentworth v. McDuffie*, 48 N. H. 402, it was held that the bailor of a mare may maintain trover against the bailee, if the bailee willfully and intentionally drove the mare at such an immoderate and violent rate of speed as seriously to endanger her life; he being aware of the danger at the time,

It was early held that a mere diversion from the line of travel or going beyond the point for which a horse was hired amounted to a conversion, and rendered the bailee absolutely liable for the value of the horse.<sup>59</sup> On this principle, bailees are held liable, though the contract of hiring was void because made on Sunday,<sup>60</sup> or voidable because the bailee was an infant.<sup>61</sup> In such cases it is not necessary to rely on the contract to establish the conversion, since, as soon as the hirer assumes control over the horse, and proceeds to take it where he has no right to take it, he is guilty of conversion, and it is immaterial how he obtained his possession originally.<sup>62</sup> Where one unintentionally deviates from the line of travel, as where

and the death of the mare being caused thereby. "The act of the bailee in willfully and intentionally driving the horse at such an immoderate rate of speed as he knew would seriously endanger the life of the horse is at least as marked an assumption of ownership, and as substantial an invasion of the bailor's right of property, as the act of driving the horse at a moderate speed one mile beyond the place named in the contract of hiring." *Id.*

<sup>59</sup> *Coggs v. Bernard*, 2 *Ld. Raym.* 909, 915 (dictum of Lord Holt). And see *Disbrow v. Tenbroeck*, 4 *El. D. Smith* (N. Y.) 397; *Wheelock v. Wheelwright*, 5 *Mass.* 104; *Rotch v. Hawes*, 12 *Pick. (Mass.)* 136; *Woodman v. Hubbard*, 25 *N. H.* 67; *Morton v. Gloster*, 46 *Me.* 491; *Crocker v. Gullifer*, 44 *Me.* 520; *Fish v. Ferris*, 5 *Duer* (N. Y.) 49; *McNeill v. Brooks*, 1 *Yerg. (Tenn.)* 73; *Wentworth v. McDuffie*, 48 *N. H.* 402; *Lucas v. Trumbull*, 15 *Gray (Mass.)* 306; *Harrington v. Snyder*, 3 *Barb. (N. Y.)* 380; *Buchanan v. Smith*, 10 *Hut. (N. Y.)* 474; *Perham v. Coney*, 117 *Mass.* 102; *Lane v. Cameron*, 38 *Wis.* 603; *Malone v. Robinson*, 77 *Ga.* 719; *Murphy v. Kaufman*, 20 *La. Ann.* 559; *Fisher v. Kyle*, 27 *Mich.* 454; *Welch v. Mohr*, 93 *Cal.* 371, 28 *Pac.* 1060. In *Cullen v. Lord*, 39 *Iowa*, 302, it was held that a disregard of instructions as to the manner of use of the thing hired will render the bailee liable only when the loss was occasioned thereby. In the case of a commodatum, it renders the bailee liable absolutely.

<sup>60</sup> *Hall v. Corcoran*, 107 *Mass.* 251, overruling *Gregg v. Wyman*, 4 *Cush. (Mass.)* 322. See, also, *Frost v. Plumb*, 40 *Conn.* 111. In *Whelden v. Chapel*, 8 *R. I.* 230, the court, without discussing the general question, held that the action must fail because the contract was made on Sunday.

<sup>61</sup> An infant is liable in trover for driving a horse beyond where he was hired to go. *Homer v. Thwing*, 3 *Pick.* 492; *Freeman v. Boland*, 14 *R. I.* 39. Where an infant deviated from the terms of his hiring, and, by reason of his overdriving and exposure of the horse, it died, it was held that the deviation was a conversion, and rendered him liable in trover. *Towne v. Wiley*, 23 *Vt.* 355. See, also, *Ray v. Tubbs*, 50 *Vt.* 688.

<sup>62</sup> *Hall v. Corcoran*, 107 *Mass.* 251.



the hirer of a horse loses his way, he is not liable for conversion. To constitute conversion there must be an intention to exercise dominion over the property.<sup>63</sup> Merely stopping along the road is not sufficient to constitute conversion.<sup>64</sup>

The strict rule that the slightest intentional deviation from the terms of the bailment contract will constitute a conversion, and render the bailee absolutely liable for any loss or injury thereafter happening, has not gone unquestioned. Both Mr. Story<sup>65</sup> and Mr. Schouler<sup>66</sup> doubt its application where the loss was not caused by the deviation, or would have occurred even had there been no deviation, but their doubt is not founded on principle. Mr. Schouler has nothing better to suggest than that the contract be liberally construed in favor of the bailee.<sup>67</sup>

In *Farkas v. Powell*,<sup>68</sup> a horse was taken beyond the point to which he was hired to go. After returning within the limits covered by the hiring, the horse stumbled and fell, and afterwards died. It was held that taking the horse beyond the point to which he was hired to go constituted, at least, a technical conversion, and, if the horse had been injured while beyond that point, the hirer would have been liable, whether the injury was caused by his own negligence, or that of others, or by accident. But, as the injury occurred after he had returned within the limits, the court held that the hirer would not be liable unless the injury was caused by his negligence, or unless the extra drive materially contributed to the injury, and the case was remanded to have these questions determined by a jury. The court said: "But the nice question in this case is, would Powell, after having been guilty of a technical conversion, or violation of his duty, and having returned within the limits of the original hiring, and the horse then sustained injury without other fault on

<sup>63</sup> *Spooner v. Manchester*, 133 Mass. 270. An intentional deviation from the line of travel is an act of dominion exercised over the horse, inconsistent with the right of the owner. *Id.* p. 273. See, also, *Wellington v. Wentworth*, 8 Metc. (Mass.) 548; *Nelson v. Whetmore*, 1 Rich. (S. C.) 318.

<sup>64</sup> *Evans v. Mason*, 64 N. H. 98, 5 Atl. 766.

<sup>65</sup> Story, *Bailm.* §§ 409, 413-413d.

<sup>66</sup> Schouler, *Bailm.* (2d Ed.) § 140.

<sup>67</sup> Schouler, *Bailm.* (2d Ed.) § 141.

<sup>68</sup> 86 Ga. 800, 13 S. E. 200.



his part, be liable? That would depend, in our opinion, upon whether the extra ride of six or eight miles to the Bryant place and back caused, or materially contributed to, the accident. If it did, we think he would be liable to the owner. The horse might have been well able to travel the five miles and return, but the six or eight miles extra may have fatigued him to such an extent as to have caused him to stumble and fall, and thus produce the injury. If, however, the extra ride did not cause or materially contribute to the injury, we do not think Powell would be liable, if guilty of no other fault. We can see no good reason to hold the hirer liable for an injury to the horse which occurred without his fault, after he had returned with it within the limits of his original contract, although he had been guilty of a technical conversion by riding it three miles beyond the point to which it was hired to go, the extra distance not causing or contributing to the injury. We have been unable to find any case, the facts of which are like the facts in this. Nearly all the cases which hold the hirer liable when he has deviated from the terms of his contract are cases in which he was negligent in fact, or willfully and wantonly misconducted himself, or had overdriven the horse, or destroyed or ruined the property while beyond the limit or in the course of deviation from the purpose of hiring.<sup>69</sup> \* \* \*

The facts in those cases show that the property was injured or destroyed during the time it was being improperly used, or being used for a different purpose from that for which it was hired. The question whether this extra ride did or did not cause or materially contribute to the injury was for the jury to determine under the evidence and a proper charge by the court."

The distinction taken in this case cannot be sustained on principle. At the very moment of conversion, the right to recover the entire value of the horse at that time vested in the owner.<sup>70</sup> This right to recover damages is a property right, which cannot be diminished or taken away except by the owner's consent.<sup>71</sup> Certainly, the

<sup>69</sup> Citing as examples *Mayor and Council of Columbus v. Howard*, 8 Ga. 213; *Gorman v. Campbell*, 14 Ga. 137; *Collins v. Hutchins*, 21 Ga. 270; *Lewis v. McAfee*, 32 Ga. 465; *Malone v. Robinson*, 77 Ga. 719.

<sup>70</sup> Ante, p. 189; 4 Am. & Eng. Enc. Law, p. 121, tit. "Conversion."

<sup>71</sup> Ante, p. 189. The owner cannot be compelled to accept the property in mitigation of damages. *Green v. Speery*, 16 Vt. 390; *Hart v. Skinner*, 16

wrongdoer cannot by his act alone, as by returning within the bailment limits, impair this right. Of course, if, after the conversion, the owner voluntarily accepts the horse, that fact may be shown, to reduce the damages.<sup>72</sup> In such case the measure of damages would be the difference between the value at the time of conversion, and the value at the time of return and acceptance by the owner.<sup>73</sup> This would leave the wrongdoer absolutely liable for any deterioration or injury in the meanwhile.<sup>74</sup> The mere return of the bailee within the bailment limits, without any action on the part of the bailor, of course, does not affect the latter's rights.<sup>75</sup>

The only escape from absolute liability in this class of cases is to hold that a mere unauthorized use of the hired property does not constitute a conversion. This the supreme court of Iowa has done in a recent case.<sup>76</sup> The court said: "To constitute a conversion in a case like that at bar, there must be some exercise of dominion over the thing hired, in repudiation of, or inconsistent with, the owner's rights. We hold that the mere act of deviating from the line of travel which the hiring covered, or going on beyond the point for which the horse was hired, are acts which, in and of themselves,

Vt. 138; *Shotwell v. Wendover*, 1 Johns. (N. Y.) 65. But where the conversion is merely technical, and the property is in the same condition, it has been held that the plaintiff may be compelled to accept its return in mitigation of damages. *Hart v. Skinner*, 16 Vt. 138; *Churchill v. Welsh*, 47 Wis. 39, 1 N. W. 398; *Cook v. Loomis*, 26 Conn. 483; *Stevens v. Low*, 2 Hill (N. Y.) 132.

<sup>72</sup> *Wheelock v. Wheelwright*, 5 Mass. 104, 106; *Sparks v. Purdy*, 11 Mo. 142; *Yale v. Saunders*, 16 Vt. 243; *Brady v. Whitney*, 24 Mich. 154; *Cook v. Loomis*, 26 Conn. 483. Acceptance of the property may or may not show a waiver of the tort, according to circumstances. Certainly, an acceptance without knowledge of the tort would not be a waiver. See *Lucas v. Trumbull*, 15 Gray (Mass.) 306; *Austin v. Miller*, 74 N. C. 274; *Reynolds v. Shuler*, 5 Cow. 323.

<sup>73</sup> *Lucas v. Trumbull*, 15 Gray (Mass.) 306; *Irish v. Cloyes*, 8 Vt. 30; *Ewing v. Blount*, 20 Ala. 694.

<sup>74</sup> 2 Sedg. Dam. § 494; *Renfro's Adm'x v. Hughes*, 69 Ala. 581; *Davenport v. Ledger*, 80 Ill. 574; *Carter v. Roland*, 53 Tex. 540; *Kinnear v. Robinson*, 2 Han. (N. B.) 73; *Jamison v. Hendricks*, 2 Blackf. (Ind.) 94.

<sup>75</sup> See *Wanamaker v. Bowes*, 36 Md. 42; *Northrup v. McGill*, 27 Mich. 234; *Bringard v. Stellwagen*, 41 Mich. 54, 1 N. W. 909.

<sup>76</sup> *Doolittle v. Shaw* (Iowa) 60 N. W. 621.

do not necessarily imply an assertion of title or right of dominion over the property inconsistent with, or in defiance of, the bailor's interest therein." This rule seems to do substantial justice, though it is opposed to the weight of authority. It is difficult to understand, however, why a use of the property in direct and intentional violation of the agreement with the owner is not an assertion of dominion inconsistent with, and in defiance of, the latter's title.<sup>77</sup>

In *Harvey v. Epes*<sup>78</sup> the contract was one for the hire of slaves for a year, to work in a certain county. They were taken by the hirer, without the owner's consent, to another county, and employed in the same kind of work, and while there died. The court, after elaborately discussing the question, and fully considering the authorities, held that the removal of the slaves to a county other than that to which they were hired to work in was not of itself a conversion, regardless of whether their death was caused by such wrongful act or not. It said: "Upon the whole, I am of the opinion that, in the case of a bailment for hire for a certain term, \* \* \* the use of the property by the hirer, during the term, for a different purpose or in a different manner from that which was intended by the parties, will not amount to a conversion for which trover will lie, unless the destruction of the property be thereby occasioned, or at least unless the act be done with intent to convert the property, and thus to destroy or defeat the interest of the bailor therein. \* \* \* A bailment upon hire is not conditional in its nature, any more than any other contract, and, in the absence of an express provision to that effect, the bailee will not, in general, forfeit his estate by a violation of any of the terms of the bailment. \* \* \* If he merely uses the property in a manner or for a purpose not authorized by the contract, and without destroying it, or without intending to

<sup>77</sup> In *Wentworth v. McDuffie*, 48 N. H. 402, 406, it is said to be the settled rule in that state that driving a horse beyond the place to which the hiring was limited constituted a conversion; and the doctrine was expressly rested upon the idea, not that driving the horse beyond the place named is conclusive evidence of the bailee's intention to convert the animal to his own use, but rather that such use of the property is so substantial an invasion of the owner's rights, and so inconsistent with the idea of an existing bailment, that the bailee cannot reasonably object to the bailor's treating the bailment as terminated thereby, and proceeding against him for conversion.

<sup>78</sup> 12 Grat. 153.

injure or impair the reversionary interest of the bailor therein, such misuser does not determine the bailment, and therefore is not a conversion for which trover will lie."<sup>79</sup>

*Same—Bailor's Right to Resume Possession.*

But the question may be asked whether the hirer acquires such a right to the use of the thing during the time of the bailment that the owner is bound to abstain from interfering with his enjoyment of it during that time, although the hirer should misuse it, or abuse or injure it, or otherwise violate his own obligations. As to this, it seems that the owner cannot justify a seizure of the thing by force from the personal possession of the hirer, whatever may be his right to retake it, if he can peaceably, wherever he can find it, under other circumstances. Thus, for example, if a horse is let to hire for two days for a stipulated journey, and the hirer, during that period, should wrongfully use the horse for another journey, and should be found on such improper journey, the owner cannot justify seizing the horse, and dragging the hirer off from the horse, while he is riding him.<sup>80</sup>

*Special Property—Right of Action against Third Persons.*

By the Roman law the hirer acquired the right of possession only of the thing for the particular period or purpose stipulated, but he acquired no property in the thing.<sup>81</sup> By the common law, in virtue of the bailment the hirer acquires a special property in the thing during the continuance of the contract, and for the purposes expressed or implied by it.<sup>82</sup> Hence he may maintain an action for any tortious dispossession of it, or any injury to it, during the existence of his right.<sup>83</sup> But since, in such case, the owner has also a

<sup>79</sup> See, also, 2 Pars. Cont. p. 128.

<sup>80</sup> Story, Bailm. § 396; Schouler, Bailm. (2d Ed.) § 139; Trotter v. McCall, 20 Miss. 413. See Lee v. Atkinson, Yel. 172.

<sup>81</sup> Story, Bailm. § 394.

<sup>82</sup> Jones, Bailm. 85, 86; Bac. Abr. "Bailment," C; Lee v. Atkinson, Yel. 172; 2 Bl. Comm. 395, 396; 2 Kent, Comm. (4th Ed.) lect. 40, p. 586; Wilbraham v. Snow, 2 Saund. 47, and note by Williams; Eaton v. Lynde, 15 Mass. 242.

<sup>83</sup> Croft v. Alison, 4 Barn. & Ald. 590; Bac. Abr. "Trespass," C; Id. "Trover," C; Ludden v. Leavitt, 9 Mass. 104; Warren v. Leland, Id. 265; Hall v. Pickard, 3 Camp. 187; Nicolls v. Bastard, 2 Crompt., M. & R. 659, 660; Bliss

general property, unless he has, by virtue of his agreement, parted with it for a definite term, he also may maintain a like suit against the stranger.<sup>84</sup> But in such a case a recovery by either, it seems, will bar, or at least may bar, the action of the other.<sup>85</sup>

Where the hiring is for a definite term, the bailor cannot maintain trover or replevin during such term.<sup>86</sup> The hirer is the proper one to bring such an action. The bailor may, however, maintain an action for injury to the reversion.<sup>87</sup>

*When Bailee Has Assignable Interest.*

A bailee at will of personal property, where the bailment may be terminated at the pleasure of either party, and a bailee in whom

*v. Schaub*, 48 Barb. (N. Y.) 339; *Woodman v. Nottingham*, 49 N. H. 387; *Rindge v. Inhabitants of Coleraine*, 11 Gray (Mass.) 158; *Hare v. Fuller*, 7 Ala. 717; *McGill v. Monette*, 37 Ala. 49; *Hopper v. Miller*, 76 N. C. 402; *White v. Bascom*, 28 Vt. 268. An auctioneer, who, as agent of the owner, sells and delivers goods on a condition which is not complied with, may maintain replevin therefor. *Tyler v. Freeman*, 3 Cush. (Mass.) 261.

<sup>84</sup> Bac. Abr. "Trespass," C; *Id.* "Trover," C; 2 Bl. Comm. 306; *Gordon v. Harper*, 7 Term R. 9; *Pain v. Whittaker*, 1 Ryan & M. 99; *Wilbraham v. Snow*, 2 Saund. 47a, notes by Williams, etc.; *Nicolls v. Bastard*, 2 Crompt. M. & R. 659; *Lacoste v. Pipkin*, 13 Smedes & M. 589.

<sup>85</sup> Story, Bailm. § 394; *Flewelling v. Rave*, 1 Bulst. 68, 69; *William v. Gwyn*, 2 Saund. 46, 47, and note.

<sup>86</sup> *Clarke v. Poozer*, 2 McMull. (S. C.) 434; *Swift v. Moseley*, 10 Vt. 208. But see *Mears v. London & S. W. Ry. Co.*, 11 C. B. (N. S.) 850; *Eldridge v. Adams*, 54 Barb. (N. Y.) 417. Unless bailee has absolute right to retain bailed property for definite time, trespass may be brought against wrongdoer to property, either in name of bailor or bailee, *Strong v. Adams*, 30 Vt. 221; or trover, *Drake v. Redington*, 9 N. H. 243. See, also, *Hurd v. West*, 7 Cow. (N. Y.) 752; *Halyard v. Dechelman*, 29 Mo. 459; *Howard v. Farr*, 18 N. H. 457; *Swift v. Moseley*, 10 Vt. 208; *Clarke v. Poozer*, 2 McMull. (S. C.) 434. A bailee for a definite term may maintain trespass against his bailor for a wrongful retaking of the property. *Burdiet v. Murray*, 3 Vt. 302. See *Angus v. McLachlan*, 23 Ch. Div. 330. In trover by a bailee against his bailor, the measure of damages is the value of the bailee's special interest in the goods; but in trover against a stranger the bailee recovers the entire value of the goods, and must hold the excess over his special interest in trust for the bailor. *Benjamin v. Stremple*, 13 Ill. 466.

<sup>87</sup> See *Schouler*, Bailm. (2d Ed.) § 154; *Howard v. Farr*, 18 N. H. 457; *White v. Griffin*, 4 Jones (N. C.) 139. See, also, *Lexington & O. R. Co. v. Kidd*, 7 Dana (Ky.) 245; *Mears v. London & S. W. Ry. Co.*, 11 C. B. (N. S.) 850.



a personal confidence is reposed, have no assignable interest in the thing bailed; and any sale by them passes no property, but puts an end to the bailment, and the bailor may bring trover or trespass against the purchaser who takes the property.<sup>88</sup> But a hirer of property for a term, or a bailee who has a lien on the property, may have an assignable interest in it; and, though his sale of the property absolutely will put an end to the bailment, yet his transfer of his interest merely (that is, of the property subject to the property rights of the general owner) will convey his interest, and the purchaser will hold the property in the same manner as the seller did.<sup>89</sup> Pledges or pawns are illustrations.<sup>90</sup> A letting for hire may be at will, or it may partake of the character of a license or personal confidence, in either of which cases the hirer will have no assignable interest.<sup>91</sup> But it may also be a letting for a fixed time, and without restriction or limitation from which any personal confidence may be inferred. It may be, in terms, to the party and his assigns, or the character of the use may be such as necessarily to imply that the property may be assigned. In every such case the hirer may be deemed to have an assignable interest.<sup>92</sup>

<sup>88</sup> *Bailey v. Colby*, 34 N. H. 29. Hirer of personal property cannot, by sale thereof, though to a purchaser in good faith, pass title. *Russell v. Favier*, 18 La. 585.

<sup>89</sup> *Bailey v. Colby*, 34 N. H. 29.

<sup>90</sup> A factor may pledge the goods to the extent of his own lien thereon, if he avowedly confines his pledge to that, and does not exceed his interest. *Man v. Shiffner*, 2 East, 523-529; *McCombie v. Davies*, 7 East, 6; *Urquhart v. McIver*, 4 Johns. 103; *Whitwell v. Wells*, 24 Pick. 25, 31. And see ante, p. 115.

<sup>91</sup> *Bailey v. Colby*, 34 N. H. 29, 36.

<sup>92</sup> "A party may lease his farm for years, with the stock and tools upon it; the whole lease, it can hardly be doubted, may be assigned. A party may let furnished lodgings for a term; the lessee has an assignable interest in the furniture. \* \* \* So a party who should lease his livery stable, with his stock of horses and carriages, for a term of years, could hardly complain if the lessee should assign his interest, unless some restriction was introduced in the lease." *Bailey v. Colby*, 34 N. H. 29, 36, 37. The hirer's transfer of his beneficial interest alone, made with due reservation of the bailor's permanent ownership, should be upheld, unless the use was strictly personal, or precarious. *Vincent v. Cornell*, 13 Pick. 294; *Nash v. Mosher*, 10 Wend. 431. See *Fenn v. Bittleston*, 7 Exch. 152.

*Warranty of Title and Right of Possession.*

Wherever property is hired for use, there is an implied warranty on the part of the bailor that he has sufficient title to make the bailment, and that the bailee shall have quiet possession. This is the rule of the civil law, and, while no direct authority for it has been found at common law, its justice and propriety are so manifest that it will doubtless be applied whenever occasion shall arise.<sup>93</sup> The common law applies the rule in the analogous case of a lease of lands. Every common-law lease of lands imports a covenant on the lessor's part for quiet enjoyment.<sup>94</sup> This implied warranty, of course, applies only against the legal claims of third persons to disturb the enjoyment and use of the thing. For tortious acts on their part, the hirer's remedy is against them alone.<sup>95</sup>

*Bailor must Warn Bailee of Defects.*

The letter of things for use must exercise due care not to expose the hirer to danger of loss and damage through defects in the thing hired. He is liable for injuries resulting from such defects, where he failed to give notice of them, provided they were known to him, or, by the exercise of due diligence, would have been known.<sup>96</sup> The bailor is only liable for negligence. What is due and reasonable care, of course, varies with circumstances. In a business involving

<sup>93</sup> Schouler, Bailm. (2d Ed.) § 151; Story, Bailm. §§ 383, 387. "A pledgor, by the act of pledging, impliedly warrants that he is the general owner of the property pledged; and he is liable to the pledgee in damages, if the property, or any part of it, is taken from the latter under a superior title." Jones, Pledges, § 52. See *Goldstein v. Hort*, 30 Cal. 372; *Mairs v. Taylor*, 40 Pa. St. 446; *Cass v. Higenbotam*, 27 Hun (N. Y.) 406.

<sup>94</sup> Tayl. Landl. & Ten. § 308; 1 Schouler, Pers. Prop. (2d Ed.) § 20.

<sup>95</sup> *Baughner v. Wilkins*, 16 Md. 35; *Playter v. Cunningham*, 21 Cal. 229; *Surget v. Arighi*, 11 Smedes & M. 87.

<sup>96</sup> It is the duty of one who hires a horse to another to give the latter a horse that is manageable and safe, and, if the horse has any vicious propensities, to inform the hirer of that fact; and he is liable in damages for any injuries resulting from his failure to impart such information. *Kissam v. Jones*, 56 Hun, 432, 10 N. Y. Supp. 94. If he gives him no notice of any vicious propensity of the horse, except to tell him, in answer to an inquiry, that the horse is all right, except a little "skeery," when he knows that the horse has a vicious habit, he will be liable for any injuries sustained by reason of such vicious habit. *Id.* Plaintiff cannot recover hire of slave, if he knew slave was unsound, and fraudulently concealed it from

the personal safety and lives of others, due care and diligence are nothing less than the most watchful care and the most active diligence; and therefore livery stable keepers and others who let horses and carriages for hire are answerable to the hirer for injuries which happen by reason of defects in carriages which might have been discovered by the most careful and thorough examination, but not for an injury which happens in consequence of a hidden defect which could not have been discovered upon such examination.<sup>97</sup>

*Liability to Third Persons for Negligence.*

Where injury results to third persons from the bailee's use of the hired property, the bailee alone is answerable. This rests on natural principles of justice. He alone has possession and control of the instrumentality of harm, and he alone ought to be liable. The doctrine of respondeat superior only applies in cases where the relation of master and servant or principal and agent is shown to exist.<sup>98</sup> It does not extend to cases of independent contracts not creating those relations. A mere contract of bailment does not create such a relation.<sup>99</sup>

*Incidental and Extraordinary Expenses.*

The common-law doctrine upon this point is still unsettled. The express or presumed intention must govern; and, as bearing upon this point, the bailment purpose, and the rate and nature of the recompense, must be considered. It would seem a fair presumption that the parties intended the bailor to bear any unforeseen and extraordinary expense, which permanently enhances the value of

defendant, providing the latter, within reasonable time after discovering fraud, offered to return slave and rescind contract. *Reading v. Price*, 3 J. J. Marsh. (Ky.) 61.

<sup>97</sup> *Hadley v. Cross*, 34 Vt. 586; *Horne v. Meakin*, 115 Mass. 326; *Towler v. Lock*, L. R. 7 C. P. 272.

<sup>98</sup> *Jag. Torts*, § 77.

<sup>99</sup> *Sproul v. Hemmingway*, 14 Pick. 1; *Schular v. Hudson River R. Co.*, 38 Barb. 653; *Carter v. Berlin Mills Co.*, 58 N. H. 52; *Stevens v. Armstrong*, 6 N. Y. 435; *Rapson v. Cubitt*, 9 Mees. & W. 710. And see *Powles v. Hider*, 6 El. & Bl. 207; *Venables v. Smith*, 2 Q. B. Div. 279. Compare *King v. Spurr*, 8 Q. B. Div. 104. The owner of a boat, who leases it to another to be used as a ferry, is not liable for an accident occurring on the boat while in use of the latter. *Claypool v. McAllister*, 20 Ill. 504. And see *Tuckerman v. Brown*, 17 Barb. 191.

the property, or wholly preserves it from loss,<sup>100</sup> provided the expense was not necessitated by the bailee's fault. It seems equally reasonable that the bailee should bear the ordinary and incidental expenses of caring for the property.<sup>101</sup> Evidence of custom is relevant to show what was the understanding of the parties. The intention of the parties is controlling. Thus, in respect to animals hired, the common understanding is that the hirer is bound to provide them with suitable food during the time of such hiring, unless there is some agreement to the contrary.<sup>102</sup> By the civil law the bailor was bound to keep the thing hired in order and repair suitable for the bailment purpose, but this is probably not true at common law.<sup>103</sup>

### *Liability for Negligence.*

The due care demanded from a hirer, want of which will render him liable for negligence, is ordinary diligence; that is, such care as business men of average intelligence and prudence exercise in their own affairs. The duty of the bailee being, then, to exercise only ordinary diligence, he is liable only for injuries shown to have been caused by an omission of such diligence; that is, by ordinary negligence.<sup>104</sup>

What is the true extent of the duty and diligence required of the hirer, in the care and custody of the thing hired, must essentially depend upon the nature and character of that thing, and its liability to loss or injury. A single illustration will sufficiently explain this doctrine in one of the most common cases of hire. It is

<sup>100</sup> One who hires a horse is not liable for expense of caring for it, if it becomes sick in his hands without his fault; but the owner is liable therefor to third person, who, with his knowledge, cares for it at request of hirer. *Leach v. French*, 69 Me. 389.

<sup>101</sup> *Schouler*, Bailm. (2d Ed.) § 152.

<sup>102</sup> *Handford v. Palmer*, 2 Brod. & B. 359; *Id.*, 5 Moore, 74.

<sup>103</sup> *Story*, Bailm. § 392.

<sup>104</sup> *Collins v. Bennett*, 46 N. Y. 490; *Chamberlin v. Cobb*, 32 Iowa, 161; *Millon v. Salisbury*, 13 Johns. 211; *Handford v. Palmer*, 2 Brod. & B. 359. A bailee for hire is only responsible for ordinary diligence, and liable for ordinary negligence, in the care of the property bailed. *Clark v. U. S.*, 95 U. S. 539. See *Jones*, Bailm. p. 88; *Story*, Bailm. §§ 398, 399; *Domat*, Civ. Law, lib. 1, tit. 4, § 3, pars. 3, 4; 1 *Bell*, Comm. (7th Ed.) pp. 481, 483. See, also, cases *infra*.



the duty of the hirer of a horse to supply him with suitable food during the time of the hiring, and therefore any neglect on his part, in this particular, will make him responsible to the owner for the damage sustained thereby.<sup>105</sup> If a hired horse is exhausted, and refuses its feed, the hirer is bound to abstain from using the horse; and, if he pursues his journey with the horse, he is liable for all the injury occasioned thereby.<sup>106</sup> If a horse falls sick during a journey, the hirer ought to procure the aid of a farrier, if one can be obtained within a reasonable time or distance; and, if he does procure such aid, he is not responsible for any mistakes of the farrier in the treatment of the horse. But if, instead of procuring the aid of a farrier, when he reasonably may, he himself prescribes unskillfully for the horse, and thus causes his death, he will be responsible for the damages, although he acts bona fide.<sup>107</sup>

Where, from its nature, the hirer must know that the thing is liable to deterioration or injury, this fact demands from him the exercise of greater diligence than in the case of a thing not supposed to be liable to injury from use.<sup>108</sup> The value of the thing must also be taken into consideration, as well as the means at command of the hirer for securing its safe-keeping. To a certain extent, the character of the hirer, and his reputation for care and skill, as known to the letter, will also have an influence in determining whether the hirer has been negligent. Thus, where the letter has delivered a horse to a person physically incapable of controlling him,

<sup>105</sup> *Handford v. Palmer*, 2 Brod. & B. 359; *Id.*, 5 Moore, 74.

<sup>106</sup> *Bray v. Mayne*, 1 Gow. 1. See *Thompson v. Harlow*, 31 Ga. 348; *Graves v. Moses*, 13 Minn. 335 (Gil. 307); *Vaughan v. Webster*, 5 Har. (Del.) 256.

<sup>107</sup> *Story*, Bailm. § 405; *Dean v. Keate*, 3 Camp. 4. As to what constitutes ordinary diligence on the part of the hirer of a horse, see *Eastman v. Sanborn*, 3 Allen, 594; *Cross v. Brown*, 41 N. H. 283; *Banfield v. Whipple*, 10 Allen, 27; *Edwards v. Carr*, 13 Gray, 234; *Wentworth v. McDuffie*, 48 N. H. 402; *Rowland v. Jones*, 73 N. C. 52; *Ray v. Tubbs*, 50 Vt. 688; *Buis v. Cook*, 60 Mo. 391; *McNeill v. Brooks*, 1 Yerg. 73; *Harrington v. Snyder*, 3 Barb. 380; *Jackson v. Robinson*, 18 B. Mon. 1; *Thompson v. Harlow*, 31 Ga. 348.

<sup>108</sup> *Beale v. South Devon Ry. Co.*, 12 Wkly. R. 1115; *Wilson v. Brett*, 11 Mees. & W. 113. See *Fortune v. Harris*, 6 Jones, 532; *Rooth v. Wilson*, 1 Barn. & Ald. 59.



or has delivered a thing of value to one who, by reason of mental weakness, will not appreciate the care proper in the safe-keeping of such a thing, it would be manifestly unjust to hold such hirer to the same degree of responsibility as a person of ordinary strength and intelligence, when the fact of such incapacity was known to the letter.<sup>109</sup> Of course, in such bailments as those now under consideration, the skill of the hirer is not such an important element, nor one demanding the same consideration from the bailor, as in those bailments where services are hired about or upon a chattel. In cases of hired use, the bailor may well rely upon the bailee's known pecuniary responsibility to make good any injury which might occur; and, moreover, in this class of cases, a personal use by the hirer is not always contemplated.<sup>110</sup>

*Same—Inevitable Accident, or Vis Major.*

Since the whole duty of the bailee, in this class of cases, is to exercise good faith and ordinary diligence in carrying out the contract, he is not liable when the thing is lost or injured by overwhelming force or inevitable accident.<sup>111</sup> So, where the hirer has been ordinarily careful, he is not liable for a loss by fire, or the death of an animal, or the natural deterioration and wear and tear incident to its proper use.<sup>112</sup> Robbery is considered an accident by superior force.<sup>113</sup> So if the loss is not strictly inevitable, but there has been no omission of reasonable diligence on the part of the hirer.<sup>114</sup> Thus, a warehouseman is not responsible for the destruction of goods, deposited there for hire, by rats or mice, if he has used

<sup>109</sup> Schouler, Bailm. (2d Ed.) § 138.

<sup>110</sup> Schouler, Bailm. (2d Ed.) § 138; *Mooers v. Larry*, 15 Gray, 451.

<sup>111</sup> Story, Bailm. §§ 408-412; *Watkins v. Roberts*, 28 Ind. 167; *McEvers v. The Sangamon*, 22 Mo. 187; *Field v. Brackett*, 56 Me. 121; *Hyland v. Paul*, 33 Barb. 241; *Ames v. Belden*, 17 Barb. 513; *Reeves v. The Constitution*, Gilp. 579, Fed. Cas. No. 11,659.

<sup>112</sup> *Millon v. Salisbury*, 13 Johns. 211; *Harrington v. Snyder*, 3 Barb. 380; *Buis v. Cook*, 60 Mo. 391; *Francis v. Shrader*, 67 Ill. 272; *Reeves v. The Constitution*, Gilp. 579, Fed. Cas. No. 11,659.

<sup>113</sup> Story, Bailm. § 412.

<sup>114</sup> *Menetone v. Athawes*, 3 Burrows, 1592; *Longman v. Gallini*, Abb. Shipp. pt. 3, c. 4, § 8; *Id.* (5th Ed.) p. 259, note d; 1 Bell, Comm. (5th Ed.) pp. 453, 455, 458; *Id.* (4th Ed.) § 394; *Reeves v. The Constitution*, Gilp. 579, Fed. Cas. No. 11,659.

the ordinary precautions to guard against the loss.<sup>115</sup> So, if the owner of slaves lets them to the master of a vessel for a voyage, and they run away in a foreign port, the master is not responsible therefor, if he has acted in good faith and with reasonable care, although he might, perhaps, have exercised a higher power of restraint or confinement over them.<sup>116</sup> So, if a horse is let to hire for a journey, and, without any negligence or default of the hirer, he escapes, and is lost or stolen, the hirer will not be responsible therefor.<sup>117</sup> Where, however, the bailee's negligence exposed the thing hired to danger of injury in the way in which it was injured, or contributed to such injury, he is liable.<sup>118</sup>

*Same—Liability of Joint Bailees.*

Where two persons jointly hire a thing for use, and it is injured during such use by the hirers, both may be made to answer for the misconduct or negligence of either one.<sup>119</sup> In a case, however, where only one hires a thing,—as, for instance, a wagon,—and invites another to share in its use, and such person does so, but without exercising any control, and simply as a passenger, only he who has hired the wagon is responsible.<sup>120</sup>

*Liability for Injurious Acts of Servants, etc.*

The hirer is not only liable for his own personal default and negligence, but for the default and negligence of his children, servants, and domestics, about the thing hired.<sup>121</sup> If, therefore, a hired

<sup>115</sup> *Cailiff v. Danvers*, Peake, 114. See *Moore v. Mourgue*, Cowp. 479; *Millon v. Salisbury*, 13 Johns. 211; *Abb. Shipp.* (5th Ed.) pt. 3, c. 3, § 9, p. 244.

<sup>116</sup> *Beverly v. Brooke*, 2 Wheat. 100.

<sup>117</sup> So, during a war, where the horse was taken from him for the use of the army. *Watkins v. Roberts*, 28 Ind. 167.

<sup>118</sup> *Buis v. Cook*, 60 Mo. 391; *Eastman v. Sanborn*, 3 Allen, 594; *Edwards v. Carr*, 13 Gray, 234; *Wentworth v. McDuffie*, 48 N. H. 402.

<sup>119</sup> *Davey v. Chamberlain*, 4 Esp. 229.

<sup>120</sup> *Davey v. Chamberlain*, 4 Esp. 229; *O'Brien v. Bound*, 2 Speers (S. C.) 495; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *Story*, Bailm. § 399.

<sup>121</sup> *Pothier*, *Contrat de Louage*, notes 193, 428; 2 Kent, Comm. (4th Ed.) lect. 40, pp. 586, 587; *Pothier*, *Pand. lib.* 19, tit. 2, note 31. *Pothier* holds the hirer responsible for the default or negligence of his boarders, guests, and undertenants. *Pothier*, *Contrat de Louage*, note 193; 1 Domat, bk. 1, tit. 4, § 2, art. 6. See, also, 1 Bell, Comm. (4th Ed.) § 389; 1 Bell, Comm. (5th Ed.) pp. 454, 455.

horse is ridden by the servant of the hirer so immoderately that he is injured or killed thereby, the hirer is personally responsible.<sup>122</sup> So, if the servant of the hirer carelessly and improperly leaves open the stable door of the hirer, and the hired horse is stolen by thieves, the hirer is responsible therefor.<sup>123</sup> So, if ready furnished lodgings are hired, and the hirer's servants, children, guests, or boarders negligently injure or deface the furniture, the hirer is responsible therefor.<sup>124</sup> So, if the injury is done by subagents employed by the hirer, the same responsibility for the negligent acts of the former about the thing bailed is incurred by the latter.<sup>125</sup>

The reason for this liability is to be found in the absence of privity between the bailor and those whom the bailee has admitted to the enjoyment and use of the hired chattels. The bailor has contracted with the bailee alone, and to him alone looks for a due per-

<sup>122</sup> Jones, Bailm. 89; 1 Bl. Comm. 430, 431; 1 Domat, bk. 1, tit. 4, § 2, art. 5; 1 Bell, Comm. (5th Ed.) p. 455; 1 Bell, Comm. (4th Ed.) § 389.

<sup>123</sup> Jones, Bailm. 89; Coggs v. Bernard, 2 Ld. Raym. 909; Salem Bank v. Gloucester Bank, 17 Mass. 1.

<sup>124</sup> Jones, Bailm. 89; Pothier, Contrat de Louage, note 193.

<sup>125</sup> Story, Ag. §§ 308, 311, 452, 457; Randelson v. Murray, 3 Nev. & P. 239; Id., 8 Adol. & E. 109; Bush v. Steinman, 1 Bos. & P. 404, 409; Illiard v. Richardson, 3 Gray, 349; Laughter v. Pointer, 5 Barn. & C. 547, 553, 554; Boson v. Sandford, 2 Salk. 440, 441; Milligan v. Wedge, 12 Adol. & E. 737; Quarman v. Burnett, 6 Mees. & W. 499. "The Roman law seems to have been relaxed a little from this severe, but important, rule; for it made the master responsible only when he was culpably negligent in admitting careless guests, or boarders, or servants into his house. 'Mihi ita placet,' says Ulpian in the Digest, 'ut culpam etiam eorum, quos induxit [his servants, guests, or boarders] præstet suo nomine, etsi nihil convenit; si tamen culpam in ducendis admittit, quod tales habuerit, vel suos, vel hospites.' It has been observed, by Pothier and Sir William Jones, that this distinction, whether the hirer was culpably negligent or not,—that is, whether he ought or ought not to have known of the bad habits or carelessness of his guests, servants, or domestics, who caused the damage,—must have been sufficiently perplexing in practice. The rule of the common law, which is like that of the foreign law in modern times, is not only more safe, convenient, and uniform in its application, but it imposes upon the hirer a salutary diligence and caution in regard to those who are admitted into his house, or kept in his service. The latter can otherwise have no other sufficient security against losses from the misconduct of guests, or boarders, or servants." Story, Bailm. § 401.

formance of the contract and a safe return of the property. If the latter admits others to the enjoyment of the use, or employs others to perform his obligations, they must be considered as his servants, agents, or instrumentalities, in such use or performance, even though they be members of his family, boarders, guests, etc. The whole doctrine rests on the universal principles of agency.<sup>126</sup>

The master is not, however, universally liable for the misdeeds of his servants. But just where the line is to be drawn is a matter of no little difficulty. On the one hand, it is very clear that the master is not liable for the independent torts of his servants; but, on the other hand, he has been held liable where he did not authorize or know of the servant's act or neglect, and even where he had disapproved or forbidden it.<sup>127</sup> According to the early Germanic theory, the master was absolutely liable for the torts of his servant. The English courts early recognized the doctrine of particular command as the test of the master's liability. By this rule the master was liable for his servant's act only when he had explicitly commanded or consented to that particular act. Subsequently, the test of liability was extended so as to include liability for conduct in pursuance of a general command or authority, express or implied. What a servant was permitted to do in the usual course of his business was regarded as equivalent to a general command. But even the general command test would exclude liability when the act of the servant was willful and forbidden. A more extended liability on the part of the master is now recognized. But the courts are not in harmony as to whether the limit of his responsibility is determined by the scope of the servant's authority, or by the course of his employment. Under the test of scope of authority, liability attaches, of course, whenever it would attach under the general or particular command tests. Under this test, the master will also be liable whenever the servant's conduct was for the master's purpose or benefit, and not for the servant's private purpose, whether it was an excessive or mistaken execution of authority, or a direct violation of the master's command. Scope of authority, as a test of the master's liability, depends for its justification upon

<sup>126</sup> Schouler, *Bailm.* (2d Ed.) 145.

<sup>127</sup> *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468.

reasoning as to the authority of the servant, and not as to the duty of the master. It is a limit assigned rather by public policy than consistent logic. Course of employment is the final test proposed. This test rests upon the proposition that in certain cases the master's liability arises, not from the relationship of master and servant, exclusively, but also from a duty owed by the master to the person injured. The test is not very definitely used. It is constantly confused with the other tests. Mr. Abbott, in a note to *Mallach v. Ridley*,<sup>128</sup> however, clearly recognizes the distinction: "Some say that it is only when the act of the servant is within the scope of employment of the master that the master is liable; others, that it is enough that it was in the course of employment. The principle now recognized is that while the employé is acting in the course of employment the employer is liable, even though the act was without the scope of employment,—that is to say, unauthorized; and a number of cases go so far as to hold (and, it seems, justly) that if it was done in the apparent course of his employment, and with the implements and facilities of the employer's place and premises, the employer is liable, notwithstanding the act may have been in a service not stipulated for by the contract of employment or during hours when the contract of employment did not require any service." In other words, the liability of the principal is not tested by the scope of employment, but by the course of service. The duty owed by the master to a third person may arise from contractual or conventional relationship of the master to the person seeking to charge him for his servant's wrong, especially where the master's premises, instrumentalities, and facilities of business made the harm possible. The true general reasons for the master's liability would seem to be that the master owes a duty to third persons, to avoid harming them, which varies with circumstances; that he insures third persons against the violation of such duty; and if his servant, in the course of his employment, violates such duty, the master is the juridical cause of the consequent injury.<sup>129</sup>

<sup>128</sup> 24 Abb. (N. C.) 172, 181.

<sup>129</sup> For an exceptionally clear and able discussion of a master's liability to third persons, in which the cases are exhaustively cited and considered, see Jag. Torts, 239-280. The above text is an epitome of that discussion.



Mr. Innes<sup>130</sup> has clarified the subject by insisting that a person may act directly, by himself, or indirectly, through instrumentalities. Instrumentalities may be personal, as servant and agent, or impersonal, as a tiger or torpedo. If the right of another be violated, it is immaterial whether the violation was the direct act of the person sought to be charged, or that of his instrumentality, whether animate or inanimate, rational or irrational. The servant is an instrumentality of the master. If a duty of the master be violated, he is liable, alike, whether he or his servant was guilty of the breach.

In the case of bailments, the bailee owes a duty to the bailor, to exercise due diligence and to return the property uninjured. If this duty is violated by his servants, subbailees, or guests, while acting in the course of employment or permitted use, the bailee is liable.<sup>131</sup> Thus, in the case suggested by Mr. Schouler,<sup>132</sup> of a guest or boarder admitted only to special rooms, if the guest or boarder should break into some private room, forcing the lock, and there wantonly deface or abstract the furniture, the hirer of the furniture would not be liable, the harm not being caused in the course of the permitted use. The boarder or guest was no more than a trespasser. If the master is not engaged in a business to which the bailment is incident, and has not engaged his servants with a view to a possible bailment, there is no ground for holding him liable for the wrongful appropriation by his servant of property of which he is a bailee, and over which he has given his servant no control. But, if such guest had abstracted or defaced the furniture in the room to which he was assigned, the hirer who had admitted him there would be clearly liable. If, however, the hirer had been negligent either in guarding the furniture, or in admitting improper persons to its use, he might be liable, even in the case first supposed.<sup>133</sup>

<sup>130</sup> Innes, Torts.

<sup>131</sup> And one who hires a horse is liable to the owner if his servant takes the horse for his own purpose, and, while so using him, injures him by negligent driving. *Coupé Co. v. Maddick* [1891] 2 Q. B. 413. A warehouseman is not liable for the loss of goods embezzled by his storekeeper or servant, in the absence of gross negligence. *Schmidt v. Blood*, 9 Wend. 268.

<sup>132</sup> Schouler, *Bailm.* (2d Ed.) § 146.

<sup>133</sup> Schouler, *Bailm.* (2d Ed.) § 146. See *Smith v. Read*, 6 Daly, 33; *Holder v. Soulby*, 8 C. B. (N. S.) 254; *Dansey v. Richardson*, 3 El. & Bl. 144.

Where the servant steps aside from the course of employment, to commit a tort, the master is not liable. What deviation from the course of employment will so interrupt the relation as to make the conduct exclusively the servant's, is not clear. "The question of what is within and what is without the course of employment—what is, and what is not, an independent tort of the servant,—it seems, cannot be referred to any very definite rule. Each case rests on its facts."<sup>184</sup> It is ordinarily a question for the jury.<sup>185</sup>

### *Redelivery.*

Another implied obligation of the hirer is to restore the thing hired, when the bailment is determined.<sup>186</sup> He is bound to restore it to the owner; and if, by any negligence or wrongful act, it is delivered to some other person, and thereby is lost to the owner, he will be responsible therefor. If it is delivered to another person, it amounts to a conversion.<sup>187</sup> So, the hirer is to restore it in as good condition as he received it, unless it has been injured by some internal decay, or by accident, or by some other means, wholly without his default.<sup>188</sup> If it has sustained any injury by his neglect, he is liable for all the damages, notwithstanding the owner has received it back.<sup>189</sup> If the hirer, instead of delivering back the thing, pays its full value to the owner, on account of the injury sustained by his own negligence, he becomes henceforth the proprietor of the thing, and the letter has no longer any title to it. So, the bailee is

<sup>184</sup> Jag. Torts, 279, citing many cases illustrating the general rule.

<sup>185</sup> *Lang v. New York, L. E. & W. R. Co.*, 80 Hun, 275, 30 N. Y. S. 137. Cf. *Towanda Coal Co. v. Heemam*, 86 Pa. St. 418; *Bank of New South Wales v. Owston*, L. R. 4 App. Cas. 270.

<sup>186</sup> *Syeds v. Hay*, 4 Term R. 260, per Buller, J.; Pothier, *Contrat de Louage*, note 197; Pothier, *Pand.* lib. 19, tit. 2, notes 27, 28, 29. See, also, *Schouler*, *Bailm.* (2d Ed.) § 158; *Cobb v. Wallace*, 5 Cold. 539; *European & Australian Royal Mail Co. v. Royal Mail Steam Packet Co.*, 8 Jur. (N. S.) 136; *Erwin v. Arthur*, 61 Mo. 386; ante, p. 11.

<sup>187</sup> *Stephenson v. Hart*, 4 Bing. 476; *Stephens v. Elwall*, 4 Mauld. & S. 259; *Youl v. Harbottle*, Peake. 68; *Devereux v. Barclay*, 2 Barn. & Ald. 702; *Willard v. Bridge*, 4 Barb. (N. Y.) 361.

<sup>188</sup> Pothier, *Contrat de Louage*, notes 197, 198, 200; Pothier, *Pand.* lib. 19, tit. 2, notes 27, 28, 29; 1 Domat, bk. 1, tit. 4, § 2, note 11; *Cooper v. Barton*, 8 Camp. 5, note; *Millon v. Salisbury*, 13 Johns. 211.

<sup>189</sup> *Reynolds v. Shuler*, 5 Cow. 323.

liable for an injury to the goods caused by his negligence while in his possession, notwithstanding a subsequent like loss by inevitable accident or irresistible force.<sup>140</sup>

The time and the place and the mode of restitution of the thing hired, and the person to whom it is to be restored, are governed by the circumstances of each particular case, and depend upon the same rules of presumption of the intention of the parties, and the same general principles of law, as are applicable in other cases of bailment.

### *Compensation.*

At the termination of the bailment, it is the bailee's duty to pay the agreed hire. If no fixed price is agreed on, then a reasonable price is to be paid, which reasonable price is usually ascertained by the customary price at the place where the contract takes effect.<sup>141</sup> If there is an agreed price, the hirer must pay that price, unless he can obtain relief on the ground of fraud. When the performance of the bailment contract depends upon the continual existence of the chattel bailed, or its continued existence in the same condition that it was when the bailment relation began, the destruction of the chattel, or an alteration in its condition which makes its continued use valueless to the bailee, discharges the bailment contract. This is on the ground that performance has become impossible.<sup>142</sup> If the destruction was without the fault of either party, the bailee is not liable to the bailor for the compensation agreed in the contract,<sup>143</sup> nor is the bailor liable to the bailee for damages for nonperformance.<sup>144</sup> But, if the bailee has received benefits from the contract prior to the destruction of the thing bailed, then the bailor can recover from him on the implied contract to pay what the use was worth.<sup>145</sup> Some cases, however, hold that a con-

<sup>140</sup> See post, "Negligence," p. 359.

<sup>141</sup> See ante, p. 45.

<sup>142</sup> Clark, Cont. 678, 682.

<sup>143</sup> Bacot v. Parnell, 2 Bailey (S. C.) 424; Collins v. Woodruff, 9 Ark. 463; Taylor v. Caldwell, 113 E. C. L. 824. Contra, Harrison v. Murrell, 5 T. B. Mon. 359.

<sup>144</sup> Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595.

<sup>145</sup> Williams v. Holcombe, 1 N. C. Repos. 365. It was so held during the Rebellion, where a slave was hired for a year, and the bailee lost his serv-

tract of hiring may be divisible, and the compensation apportioned pro rata up to the time of the destruction of the thing hired.<sup>146</sup> Other cases expressly deny any apportionment, and base the recovery on the reasonable worth of the use, instead of on the contract price.<sup>147</sup> In cases where completion of the bailment purpose becomes impossible, from causes not attributable to the fault of the bailor, or to the destruction of the bailed chattel, the bailee is still liable to the bailor for the agreed compensation. If, however, the bailor's fault has prevented a beneficial use by the bailee, then the latter need not pay for the hire of the chattel.<sup>148</sup> Judge Story's statement<sup>149</sup> is clearly too broad, when he says: "Where there has not been any use or enjoyment of the thing hired, without the default of the hirer, whether it has been occasioned by accident, or by the default of the letter, no hire whatsoever will, by the common law, become due; for that law generally insists upon the contract being fully and strictly performed, to entitle the letter to any recompense."

ices by reason of the occupation of the state by the Union forces before the year was past. *Wilkes v. Hughes*, 37 Ga. 361. Where a horse, hired to perform a certain journey and back, becomes disabled by lameness while on his return, without any fault on the part of the hirer, so that he is unable to travel, and the hirer is thereby compelled to procure other means of returning home, and to incur expenses in consequence thereof, those expenses may be recouped against the demand of the bailor for the hire of the horse; and, if they exceed the value of the horse's services, the bailor cannot recover in an action brought for such services. *Harrington v. Snyder*, 3 Barb. (N. Y.) 380.

<sup>146</sup> *George v. Elliott*, 2 Hen. & M. (Va.) 5; *Williams v. Holcombe*, 1 N. C. Repos. 365; *Collins v. Woodruff*, 9 Ark. 463. So held where death of a slave was caused by bailee's negligence. *Muldrow v. Railway Co.*, 13 Rich. (S. C.) 69.

<sup>147</sup> *Bacot v. Parnell*, 2 Bailey (S. C.) 424; *Ripley v. Wightman*, 4 McCord (S. C.) 447.

<sup>148</sup> See *Hickok v. Buck*, 22 Vt. 149.

<sup>149</sup> Ballm. § 417a.

*End thus, Jan 2 3rd.*

SAME—LOCATIO OPERIS, OR HIRE OF LABOR AND  
SERVICES.

42. In bailments for hired labor and services about a chattel, the bailee must, in good faith, perform the intended services.
43. The services to be performed about a chattel depend upon the special contract, and are of almost infinite variety, but they may be grouped in three classes, viz.:
- (a) *Locatio operis faciendi* (p. 213).
  - (b) *Locatio custodiæ* (p. 213).
  - (c) *Locatio operis mercium vehendarum* (p. 213).
44. Unless varied by the special contract, the normal rights and liabilities of the parties are as follows:
- (a) The bailee has a special property in the thing bailed, which he may protect by action. This special property is an insurable interest (p. 214).
  - (b) The bailee is entitled to suitable compensation, upon due performance of the bailment (p. 216).
  - (c) *Prima facie*, a hired bailee must bear the ordinary and incidental expenses of executing the bailment (p. 222).
  - (d) Every bailee who performs services about a chattel for hire has a lien on such chattel for his reasonable charges (p. 222).
  - (e) The title to materials employed in repairing a thing passes to the bailor, under the doctrine of accession (p. 235).
  - (f) Ordinary diligence is the measure of care required of bailees for hire, and they are liable for losses caused by a failure to exercise such degree of care, and only then except in three classes of cases (p. 235).



**EXCEPTION**—Considerations of public policy have imposed exceptional liabilities in three classes of cases, viz.:

- (1) Innkeepers (p. 254).
- (2) Common carriers (p. 304).
- (3) Post-office department (p. 483).

In bailments for hired services about a chattel, the primary duty of the bailee is to perform the agreed services in good faith, and for any failure to do so he must respond in damages. What the particular duty is, in any case, depends, of course, upon the special contract.<sup>150</sup> For convenience, however, all bailments for hired services may be divided into three classes: (1) *Locatio operis faciendi*, or the hire of active labor and services, such as of tailors to make clothes, of jewelers to set jewels, or watchmakers to repair watches. To this class belong agents, factors, commission merchants, and other persons acting for a compensation. This bailment is closely analogous to a *mandatum*, differing only in the fact that the services are rendered for a reward. (2) *Locatio custodiæ*, or the hire of care and attention about goods,—the receiving of goods on deposit for a reward for their custody. It is true that care and attention about goods almost necessarily involve some physical labor, for which reason such bailments might well be treated as instances of *locatio operis faciendi*. Perhaps the only distinction between the two classes is that the principal undertaking in *locatio operis faciendi* lies in feascance; that of *locatio custodiæ*, in custody.<sup>151</sup> In this class are warehousemen, wharfingers, and other depositaries for hire. Innkeepers, also, belong to this class. The custody of a traveler's goods is accessory to the principal contract. Public policy has charged innkeepers with exceptional liabilities, however, and therefore they will be considered separately.<sup>152</sup>

<sup>150</sup> Upon a bailment of goods for work and labor to be done thereon by the bailee, the contract between the parties arises immediately upon the delivery of the goods to the bailee, and he cannot afterwards impose conditions, nor limit his liability resulting from such bailment. *Dale v. Lee*, 51 N. J. Law, 378.

<sup>151</sup> Story, *Bailm.* § 422; Jones, *Bailm.* 98.

<sup>152</sup> See post, p. 254.

(3) *Locatio operis mercium vehendarum*, or the hired carriage of goods. Carriers of goods may be divided into private and public or common carriers. Exceptional liabilities have also been imposed upon common carriers, for which reason, as well as because of the importance of the subject, they will be separately considered.<sup>153</sup> Postmasters are also carriers for hire, with exceptional liabilities.<sup>154</sup> Private carriers for hire may be defined as those who, not making hired transportation their calling, undertake to transport, for reward, on some particular occasion.<sup>155</sup> Instances of private carriers for hire are not very numerous. There is no essential difference in principle between the three classes just enumerated. With the exception of postmasters, innkeepers, and common carriers, the same principles control the rights and liabilities of the parties.

*Special Property of Bailee—Right of Action against Third Persons.*

Bailees for hire of labor and services, like bailees for hire of things for use, have a special property in the thing about which the services are to be performed.<sup>156</sup> The bailee has a right to undisturbed possession of the property, even as against the bailor, pending the accomplishment of the bailment purpose.<sup>157</sup> He has a right to earn the stipulated compensation. He may maintain trespass or trover to protect his interest.<sup>158</sup> Thus, where a bailee of yarn was to procure it to be made into cloth for a commission, it was held that he had a special property in the yarn, and that he might maintain an action against any one who should wrongfully take it from his own possession, or from that of his servant, to whom he had delivered it to be woven.<sup>159</sup>

<sup>153</sup> See post, p. 304.

<sup>154</sup> See post, p. 483.

<sup>155</sup> Schouler, *Bailm.* (2d. Ed.) § 96; Story, *Bailm.* §§ 457-459; *White v. Bascom*, 28 Vt. 268; *Pennewill v. Cullen*, 5 Har. (Del.) 238. See, also, post, p. 301.

<sup>156</sup> Story, *Bailm.* § 422a.

<sup>157</sup> Schouler, *Bailm.* (2d. Ed.) § 110.

<sup>158</sup> *Shaw v. Kaler*, 106 Mass. 448; *Burdlet v. Murray*, 3 Vt. 302; *Evans v. Nichol*, 4 Scott, N. R. 43. But see *Morse v. Androscoggin R. Co.*, 39 Me. 285; *In re Phœnix Bessemer Steel Co.*, 4 Ch. Div. 112.

<sup>159</sup> *Eaton v. Lynde*, 15 Mass. 241.

*Same—Insurable Interest.*

The special property of a hired bailee is of sufficient value to give him an insurable interest in the subject of the bailment.<sup>160</sup> Under a policy of insurance the bailee may recover the entire loss to the property, and is not limited to his interest as bailee, unless the policy so provides.<sup>161</sup> But any excess over his own interest which a hired bailee may recover must be held in trust for the bailor.<sup>162</sup> The bailee may recover the entire loss, because he is accountable over to the owner for the insurance money; holding it, as he did the goods, in trust.<sup>163</sup> But the bailee is entitled first to full indemnity for his own loss.

<sup>160</sup> *Fire Ins. Ass'n of England v. Merchants' & Miners' Transp. Co.*, 66 Md. 339; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368. The policy is valid, though taken without direction of or notice to the owner. *Waters v. Monarch Fire & Life Assur. Co.*, 5 El. & Bl. 870.

<sup>161</sup> *Stillwell v. Staples*, 19 N. Y. 401; *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606; *Johnson v. Campbell*, 120 Mass. 449; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 409, 10 Sup. St. 365; *Waters v. Monarch Fire & Life Assur. Co.*, 5 El. & Bl. 870. Where the policy is ambiguous, as to whether it covers the whole property, or only the bailee's interest, parol evidence is admissible to show the intent of the parties. *Lee v. Adsit*, 37 N. Y. 78. But where the language is unambiguous, parol evidence cannot be received to show, contrary to the terms of the policy, that the insurance is only on bailee's interest. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 541; *Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1, 14 S. W. 317.

<sup>162</sup> *Stillwell v. Staples*, 19 N. Y. 401; *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606; *Waters v. Monarch Fire & Life Assur. Co.*, 5 El. & Bl. 870. Where the bailee has insured the entire property, the owner is entitled, by adopting such insurance, to the benefit thereof, and such adoption may be made even after loss. *Wiltenberger v. Beacom*, 9 Pa. St. 198; *Finney v. Fairhaven Ins. Co.*, 5 Mete. (Mass.) 192; *Waring v. Indemnity Fire Ins. Co.*, supra. No particular form of adoption is necessary. The question is one of fact. *Hooper v. Robinson*, 98 U. S. 528, 537; *Fire Ins. Ass'n of England v. Merchants' & Miners' Transp. Co.*, supra.

<sup>163</sup> *Reitenbach v. Johnson*, 129 Mass. 316. Warehouseman insuring property in his custody, under a contract requiring him so to do, is, in respect to such insurance, the trustee of the owners, and, as such, bound to make proofs of loss, and to institute proceedings for collection. *Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1, 14 S. W. 317.

*Compensation.*

The bailee in a bailment for hired services has, from the very nature of the bailment, and as its name implies, the right to compensation for his services. As to the amount of such compensation, this may have been fixed in the original contract, or the work may be done with the understanding that a reasonable and proper recompense shall be made to the one undertaking the performance of the labor or service. The time for making such compensation may be fixed by the established usage or custom in similar cases. The compensation itself may be payable in installments, or it may be payable only upon the completion of the undertaking. The question of compensation in the case of a hire of services may arise in three different forms, accordingly as the service has been fully performed in accordance with mutual intent, or not, and in each must be solved according to the attendant circumstances.

*Same—Service Left Incomplete.*

The first instance is where the thing intrusted to the bailee, and while still in his possession, perishes without fault on the part of the bailee. According to Pothier,<sup>164</sup> the employer must compensate the workman for the labor bestowed upon the thing by the latter, unless this has been otherwise arranged by the original contract. The workman is entitled, not only to compensation for his labor, but also for material of his own used by him as accessorial to that of his bailor. This was decided in an early English case,<sup>165</sup> which was an action by a shipwright for work and labor done, and for materials provided, in repairing the defendant's vessel. The ship was in the dock, and was to have gone out on the following day, as there were only three hours' work remaining to be done. Before the completion of this work the ship was burned by an accidental fire. It was held that the shipwright was entitled to recover for his labor and materials. This decision was based upon the maxim that in such a case "*res perit domino*." Such is the common-law rule, which may, however, be controlled by mutual agreement, or in

<sup>164</sup> Poth. Cont. de Louage, note 433. See, also, Story, Bailm. § 426; Menetone v. Athawes, 3 Burrows, 1592; Gillett v. Mawman, 1 Taunt. 137.

<sup>165</sup> Menetone v. Athawes, 3 Burrows, 1592.

accordance with the custom and usage in a particular trade.<sup>166</sup>

If, however, there is a mutual understanding that the work is to be done as a whole, or by the job, for a certain stipulated price, payable on completion of the job, and the thing perish before the completion of the work, without fault of either party, it would be held, at common law, that the work must perish to the workman, and the thing must perish to the employer.<sup>167</sup> By this rule, therefore, unless by a special usage of trade, the workman will be entitled to no compensation, *pro tanto*, for either work or material which he may have furnished.

If the work be entirely completed, but the thing is not yet returned to the employer at the time of its destruction without fault on either side, the workman might be held entitled to full compensation. According to Mr. Schouler,<sup>168</sup> "if the workman had agreed to furnish all or the principal materials himself, he would have to lose both work and materials, his position not being that of a bailee at all." This rule is based upon the fact that in such cases the workman is to be considered as the owner, and the maxim "*Res perit domino*" applies. The rules just given apply only in case there has been no default by either party to the contract, and where there has been no special agreement which will prevent or limit its operation.

The question may arise under a general contract of hire, or under a special contract. It may arise where the contract is yet executory and open, or where the work has been finished, and the contract executed. Where the work is done under a general contract of

<sup>166</sup> Story, Bailm. § 426a; *Gillett v. Mawman*, 1 Taunt. 137. Mr. Bell has deduced the following as the true rules on the subject: If the work is independent of any materials or property of the employer, the manufacturer has the risk, and the unfinished work perishes to him. If he is employed in working up the materials, or adding his labor to the property of the employer, the risk is with the owner of the thing with which the labor is incorporated. If the work has been performed in such a way as to afford a defense to the employer against a demand for the price, if the accident had not happened (as, if it was defectively or improperly done), the same defense will be equally available to him after the loss. 1 Bell, Comm. p. 450.

<sup>167</sup> Story, Bailm. § 426; *Brumby v. Smith*, 3 Ala. 123; *Appleby v. Myers*, L. R. 2 C. P. 651, 656.

<sup>168</sup> Schouler, Bailm. (2d. Ed.) § 111.



hire, if it is badly and improperly done, the workman will be entitled to recover nothing, in case it totally fails of being of any use or value, or is wholly inadequate to the purpose for which it was designed. But if it has some use or value, although imperfectly or inartificially done, the workman is entitled to recover as much as the labor, services, and materials are reasonably worth, under all the circumstances.<sup>169</sup> Where the work is left unfinished and incomplete, by the willful neglect or wanton refusal of the workman to complete it, if it has been undertaken to be done by the job, and so the contract is entire, he cannot recover anything.<sup>170</sup> And, if he works by the day, he is, at most, entitled to no compensation beyond what remains after deducting all damages which the employer may have suffered by his omission or refusal.<sup>171</sup> If the work is prevented from being completed by an accident which no ordinary prudence could have prevented, the workman will be entitled to receive compensation pro tanto, as we have already seen.<sup>172</sup> If he is prevented from completing it by the act or negligence of the employer, he will be entitled to a full compensation.<sup>173</sup>

On the other hand, if the work has been done under a special contract, according to the general rule of the common law, no compensation can be recovered under that contract, unless all the terms and stipulations thereof have been exactly complied with and fulfilled.<sup>174</sup> Thus, if a carpenter has undertaken to erect a house according to a particular plan, and for a specified price, and by his own default he does not complete the work, or if he deviates from the plan, or he does the work unfaithfully, unskillfully, or improv-

<sup>169</sup> *Farnsworth v. Garrard*, 1 Camp. 38; *Basten v. Butter*, 7 East, 479; *Cutler v. Close*, 5 Car. & P. 337; *Thornton v. Place*, 1 Moody & R. 218; *Grant v. Button*, 14 Johns. 377.

<sup>170</sup> *Faxon v. Mansfield*, 2 Mass. 147; *Sinclair v. Bowles*, 9 Barn. & C. 92.

<sup>171</sup> *Story*, Bailm. § 441.

<sup>172</sup> *Menetone v. Athawes*, 3 Burrows, 1592; *Russell v. Koehler*, 66 Ill. 459; *Waller v. Parker*, 5 Coldw. 476; *Smith v. Meegan*, 22 Mo. 150.

<sup>173</sup> *Dubois v. Delaware & H. Canal Co.*, 4 Wend. (N. Y.) 285.

<sup>174</sup> *Ellis v. Hamlen*, 3 Taunt. 52; *Jennings v. Camp*, 13 Johns. 94; *McMillan v. Vanderlip*, 12 Johns. 165; *Cutter v. Powell*, 6 Term R. 320. See, also, *Thornton v. Place*, 1 Moody & R. 218; *Cooke v. Munstone*, 1 Bos. & P. (N. R.) 351.

erly, he cannot recover under the special contract.<sup>175</sup> If the work is not completed, he is not entitled to recover anything, because the special contract is yet open and unexecuted, and he cannot avail himself of his own default or misconduct to rescind it.<sup>176</sup> If he has deviated from the plan or contract, or he has done the work unskillfully or improperly, he cannot recover, because such a deviation or misconduct in the work is not fulfillment, but is a violation, of the contract, entitling the employer to damages.

Formerly, it seems to have been thought that under any of these circumstances the workman was not entitled to recover any compensation whatsoever in any other form of action, or upon a quantum meruit.<sup>177</sup> But the doctrines and distinctions now maintained by the better authorities are these: If the special contract still remains open, and is unexecuted by the misconduct or default of the workman, he cannot recover anything for his work and labor and materials employed in part fulfillment of the contract.<sup>178</sup> If the contract has been rescinded by the parties, or the work has not been completed from inevitable accident, and is incapable of being completed, or if the employer has prevented or dispensed with the due execution thereof, the workman is entitled, in the former case, to a compensation pro tanto for the work done, unless there is something in his contract that prevents it;<sup>179</sup> and, in the latter case, to a full compensation, on account of the default on the other side.<sup>180</sup>

<sup>175</sup> *Ellis v. Hamlen*, 3 Taunt. 53; *Cousins v. Paddon*, 2 Crompt. & Mee. & R. 547; *Burn v. Miller*, 4 Taunt. 745, 747; *Taft v. Montague*, 14 Mass. 282; *Jewell v. Schroeppel*, 4 Cow. 564; *Sickels v. Pattison*, 14 Wend. 257.

<sup>176</sup> *Jennings v. Camp*, 13 Johns. 94. Cf. *Brumby v. Smith*, 3 Ala. 123; *Appleby v. Myers*, L. R. 2 C. P. 651, 656.

<sup>177</sup> *Ellis v. Hamlen*, 3 Taunt. 53.

<sup>178</sup> *Sinclair v. Bowles*, 9 Barn. & C. 92; *Clark v. Smith*, 14 Johns. 326; *Raymond v. Bearnard*, 12 Johns. 274; *Jennings v. Camp*, 13 Johns. 94; *Faxon v. Mansfield*, 2 Mass. 147; *McMillan v. Vanderlip*, 12 Johns. 163; *Champlin v. Butler*, 18 Johns. 169.

<sup>179</sup> *Robson v. Godfrey*, 1 Starkle, 275; *Dubois v. Delaware & H. Canal Co.*, 4 Wend. 285, affirmed 15 Wend. 88.

<sup>180</sup> *Koon v. Greenman*, 7 Wend. 121; *Dubois v. Delaware & H. Canal Co.*, 4 Wend. 285.

*Same—Service not in Accord with Mutual Intent.*

If the work has been done, and fully completed, but not according to the terms of the special contract, as if there has been a deviation from the plan or contract, or a bad and improper execution thereof, or the work has not been completed within the stipulated time, there the workman will be entitled to recover compensation, or not, according to circumstances. If the work has been so improperly and unskillfully done that it is of no use, benefit, or value to the employer, or does not in any manner whatsoever answer the intended purpose, no compensation whatsoever is recoverable.<sup>181</sup> But if the work, although improperly or unskillfully done, is still of some use, benefit, and value to the employer, the workman will be entitled to recover so much as the work is reasonably worth to the employer, under all the circumstances, making him all due and reasonable deductions and allowances for damages caused by the improper execution of the work.<sup>182</sup> If the work has been well and properly done, but not within the stipulated time, the workman will, in like manner, be entitled to the compensation stipulated in the contract, making to the employer all due deductions and allowances for any damage or loss occasioned by the delay.<sup>183</sup>

In cases where there has been a deviation from the terms of the contract, by doing any extraordinary work, or by using materials of a superior quality or value, not contemplated by the contract, the undertaker will not be entitled to any compensation therefor, even if such extraordinary work or superior materials have greatly enhanced the value of the thing, and are for the benefit of the employer, unless they have been so done and used with his consent, or

<sup>181</sup> *Farnsworth v. Garrard*, 1 Camp. 38; *Duncan v. Blundell*, 3 Starkie, 6; *Basten v. Butter*, 7 East, 479; *Linningdale v. Livingston*, 10 Johns. 36; *Jennings v. Camp*, 13 Johns. 94, 97; *Grant v. Button*, 14 Johns. 377; *Jewell v. Schroepel*, 4 Cow. 564; *Chapel v. Hickes*, 2 Crompt. & M. 214; *Id.*, 4 Tyrw. 43; *Cutler v. Close*, 5 Car. & P. 337; *Thornton v. Place*, 1 Moody & R. 218; *Taft v. Montague*, 14 Mass. 282; *Feeter v. Heath*, 11 Wend. 477.

<sup>182</sup> *Id.* And see *Hillyard v. Crabtree's Adm'r*, 11 Tex. 264.

<sup>183</sup> *Jewell v. Schroepel*, 4 Cow. 564. See *Littler v. Holland*, 3 Term. R. 590; *Phillips v. Rose*, 8 Johns. 306; *Dubois v. Delaware & H. Canal Co.*, 4 Wend. 285.

by his approval or acquiescence.<sup>184</sup> But if, in either case, the deviation from the contract was with the assent or the acquiescence of the employer, then the undertaker will be entitled to recover upon the original contract, so far as it can be traced, and has been followed, in the execution of the contract, and on a quantum meruit for the residue of his services.<sup>185</sup> If the work has, with the express assent or the acquiescence of the employer, been left incomplete, or the latter has knowingly dispensed with a perfect and skillful performance of it, in like manner a full compensation can be recovered by the undertaker.<sup>186</sup> Where work has been done on the property of the employer, it is sometimes difficult to deduce any just inference of such assent or acquiescence or dispensation with the terms of the original contract, because he is often compelled to use the thing as it is, with all its imperfections, especially if the work is done on a thing of an immovable nature. But where the thing is of a movable nature, and may be rejected, if unsatisfactory,—as, for example, a bureau made out of a log of mahogany belonging to the employer, or a silver urn made out of old silver furnished by the employer,—there the receipt of the article without any objection may, perhaps, furnish a just ground to presume a waiver of all objections, notwithstanding the unskillfulness or incompleteness of the workmanship.<sup>187</sup>

*Same—Service Fully Performed.*

Where the service contracted for has been fully performed, in exact accordance with the mutual intent of the parties, the bailor is entitled to full compensation.

<sup>184</sup> 1 Bell, Comm. (5th Ed.) pp. 455, 456; 1 Bell, Comm. (4th Ed.) §§ 391, 393; *Wilmot v. Smith*, 3 Car. & P. 453; *Lovelock v. King*, 1 Moody & R. 60; *Burn v. Miller*, 4 Taunt. 745, 749.

<sup>185</sup> 1 Bell, Comm. (5th Ed.) pp. 455, 456; 1 Bell, Comm. (4th Ed.) §§ 391, 393; *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 299; *Id.*, Pet. Cond. R. 501; *Robson v. Godfrey*, 1 Starkie, 275; *Id.*, 1 Holt, 236; *Pepper v. Burland, Peake*, 103.

<sup>186</sup> *Linningdale v. Livingston*, 10 Johns. 36; *Burn v. Miller*, 4 Taunt. 745, 749; *Dubois v. Delaware & H. Canal Co.*, 4 Wend. 285; *Hollinshead v. Macatur*, 13 Wend. 276.

<sup>187</sup> *Story*, Bailm. § 441c.

*Expenses of Executing the Bailment.*

In bailment for hired services, it is a prima facie presumption that the parties intended the expenses ordinarily incidental to the execution of the bailment contract to be borne by the bailee. He is presumed to have fixed his compensation high enough to cover them.<sup>188</sup> No such presumption applies in the case of extraordinary expenses incurred in an unforeseen and extreme emergency.  
*Lien.*

It may safely be laid down as a general rule that every bailee for hire who performs services about the goods of another has a lien on such goods to secure his reasonable charges.<sup>189</sup> This includes all such mechanics, tradesmen, and laborers as receive property for the purpose of repairing, cleaning, or otherwise improving its condition;<sup>190</sup> also, warehousemen,<sup>191</sup> who merely keep goods, and carriers,<sup>192</sup> who transport them. Agisters and livery stable keepers constitute, perhaps, the only exceptions. At common law, these two classes of bailees have no lien, though one is very generally given them now by statute.<sup>193</sup>

<sup>188</sup> Story, Bailm. §§ 425, 426, 441; Schouler, Bailm. (2d Ed.) § 114; 2 Kent, Comm. 590; Whitlock v. Heard, 13 Ala. 776.

<sup>189</sup> Wilson v. Martin, 40 N. H. 88. "Whenever a party has expended labor and skill in the improvement of a chattel bailed to him, he has a lien upon it." Bevan v. Waters, Moody & M. 235; Scarfe v. Morgan, 4 Mees. & W. 270, 278; Harris v. Woodruff, 124 Mass. 205; Morgan v. Congdon, 4 N. Y. 552; Mathias v. Sellers, 86 Pa. St. 486; Farrington v. Meek, 30 Mo. 578; McIntyre v. Carver, 2 Watts & S. 392.

<sup>190</sup> Cowper v. Andrews, Hob. 39, 41a; Case of an Hostler, Yel. 67. And see the learned and valuable note of Mr. Justice Metcalf to this case, in his edition of Yelverton (page 67a), and the authorities therein collected and commented upon; Green v. Farmer, 4 Burrows, 2214; Close v. Waterhouse, 6 East, 523, note 2; 2 Kent, Comm. (5th Ed.) 635; Grinnell v. Cook, 3 Hill, 485, 491; Oaks v. Moore, 24 Me. 214.

<sup>191</sup> Bass v. Upton, 1 Minn. 408 (Gil. 292); Low v. Martin, 18 Ill. 286; Steinman v. Wilkins, 7 Watts & S. 466. Wharfingers: Brookman v. Hamill, 43 N. Y. 554; Ex parte Lewis, 2 Gall. 483, Fed. Cas. No. 8,310; Holderness v. Collinson, 7 Barn. & C. 212; Lenckhart v. Cooper, 3 Bing. (N. C.) 99; Dresser v. Bosanquet, 4 Best & S. 460.

<sup>192</sup> Fuller v. Bradley, 25 Pa. St. 120. See post, p. 342.

<sup>193</sup> Ante, p. 193. See, also, as to agisters: Grinnell v. Cook, 3 Hill, 485, 491; Goodrich v. Willard, 7 Gray, 183; Miller v. Marston, 35 Me. 153; Lewis v.



The doctrine of liens has been much favored in the law, and has been constantly extended. Lord Kenyon said in *Kirkman v. Shawcross*<sup>194</sup> that it had been the wish of the courts, in all cases, and at all times, to carry the lien of the common law as far as possible; and Chief Justice Best said<sup>195</sup> that the doctrine of lien is so just between debtor and creditor that it cannot be too much favored. Owing to this extension of the doctrine, the early and late cases cannot be wholly reconciled. "The truth is, the modern decisions evince a struggle of the judicial mind to escape from the narrow confines of the earlier precedents, but without, as yet, having established principles adapted to the current transactions and convenience of the world."<sup>196</sup>

The right of lien at common law was originally confined to cases where persons, from the nature of their occupation, were under obligation, according to their means, to receive, and be at trouble and expense about, the personal property of others, and was limited to certain trades and occupations necessary for the accommodation of the public, such as common carriers, innkeepers, farriers, and the like.<sup>197</sup>

The doctrine was first extended so as to include cases where the chattel had acquired additional value by the labor and skill of an artisan,<sup>198</sup> and finally to include almost every case where a bailor

Tyler, 23 Cal. 364; *Wills v. Barrister*, 36 Vt. 220; *Millikin v. Jones*, 77 Ill. 372; *Allen v. Ham*, 63 Me. 532 (by statute); *Chapman v. Allen*, Cro. Car. 271. Livery stable keepers: *Jackson v. Cummins*, 5 Mees. & W. 350; *Parsons v. Gingell*, 4 C. B. 545; *Smith v. Dearlove*, 6 C. B. 132; *Miller v. Marston*, 35 Me. 153; *Wallace v. Woodgate*, 1 Car. & P. 575; *Hickman v. Thomas*, 16 Ala. 666; *McDonald v. Bennett*, 45 Iowa, 456; *Mauney v. Ingram*, 78 N. C. 96; *Judson v. Etheridge*, 1 Crompt. & M. 742.

<sup>194</sup> 6 Term R. 14, 17.

<sup>195</sup> *Jacobs v. Latour*, 5 Bing. 130, 132.

<sup>196</sup> *Steinman v. Wilkins*, 7 Watts & S. (Pa.) 466, 467.

<sup>197</sup> *Wilson v. Martin*, 40 N. H. 88.

<sup>198</sup> The services must be such, to create a lien, as to improve the property intrusted to the bailee. *De Vinne v. Rianhard*, 11 Wkly. Dig. 268; *Jackson v. Cummins*, 5 Mees. & W. 342, 348; *Scarfe v. Morgan*, 4 Mees. & W. 270; *Bevan v. Waters*, Moody & W. 235; *Id.*, 3 Car. & P. 520; *Forth v. Simpson*, 13 Q. B. 680; *Harris v. Woodruff*, 124 Mass. 205; *Story*, Bailm. (9th Ed.) § 453a.

for hire performs services about the chattel.<sup>199</sup> The cases are necessarily a little inharmonious. The general statement of the rule still is that the property must have been enhanced in value, or there will be no lien.<sup>200</sup> But this cannot be taken too strictly. Where work is done on a chattel in accordance with the owner's directions, an enhancement of value could perhaps be conclusively presumed; but, in the case of a warehouseman, in no proper sense can the property be said to have been enhanced in value by the act of the bailee. The truth is, the common-law lien is a creature of policy. It rests on its own inherent justness and expediency.<sup>201</sup>

*Same—Agisters and Livery Stable Keepers.*

There is no very satisfactory reason for denying a lien to agisters and livery stable keepers, and it is very commonly given now by statute, and the parties were always at liberty to stipulate for a lien.<sup>202</sup> Two reasons are usually given for denying a lien in this class of cases. One rests upon the theory that a lien only exists when the chattel has been enhanced in value by the skill and labor of the bailee, and it is held that agisters and livery stable keepers do not fall within the rule.<sup>203</sup> On the other hand, a livery stable keeper has a lien for the keep and exercise of a horse sent to him for the purpose of being trained.<sup>204</sup> In *Scarfe v. Morgan*<sup>205</sup> it was held that when S. sent his mare to M., a farmer, to be covered by a stallion belonging to him, M. had a lien on the mare for the charge for covering her. The distinction between these two classes of cases is pointed out by Parke, B., in *Jackson v. Cummins*.<sup>206</sup> He

<sup>199</sup> "The right to demand compensation is, as a rule, understood to carry with it the right of compelling compensation by a particular lien." Schouler, *Bailm.* (2d Ed.) § 122.

<sup>200</sup> 1 Jones, *Liens* (2d Ed.) § 742. See, also, *Morgan v. Congdon*, 4 N. Y. 552; *King v. Humphreys*, 10 Pa. St. 217; *Eaton v. Lynde*, 15 Mass. 242; *Burdiet v. Murray*, 3 Vt. 302.

<sup>201</sup> Story, *Bailm.* § 453a; *Steinman v. Wilkins*, 7 Watts & S. 466.

<sup>202</sup> Schouler, *Bailm.* (2d Ed.) § 126; *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 491.

<sup>203</sup> Story, *Bailm.* 453a; *Scarfe v. Morgan*, 1 Mees. & W. 270; *Jackson v. Cummins*, 5 Mees. & M. 342; *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 491.

<sup>204</sup> *Bevan v. Waters*, 3 Car. & P. 520. And see *Forth v. Simpson*, 13 Q. B. 680.

<sup>205</sup> 4 Mees. & W. 270.

<sup>206</sup> 5 Mees. & W. 342.

says: "The general rule, as laid down by Best, C. J., in *Bevan v. Waters*, and by this court in *Scarfe v. Morgan*, is that by the general law, in the absence of any specific agreement, whenever a party has expended labor and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now, the case of an agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly, by means of any instrument in his possession, as was the case with the stallion in *Scarfe v. Morgan*. He simply takes in the animal to feed it."

The second reason why there can be no lien at common law in this class of cases is a more serious one. When horses are kept at livery, the owner takes and uses them at pleasure, and a bailee only has a lien so long as he retains the uninterrupted possession.<sup>207</sup> If the owner gets the property into his hands without fraud, the lien is at an end, and it will not be revived by the return of the goods.<sup>208</sup> So, in the case of milch cows, the agister has no lien, for the reason that the owner has occasional possession, for the purpose of milking them.<sup>209</sup>

*Same—Consent of Owner.*

Inasmuch as the lien of a bailee, who, by his skill and labor, has enhanced the value of a chattel, arises from his employment to render the services, it will follow that the employment must be by the owner, whose property is to be affected by the lien, or by his consent, express or implied.<sup>210</sup> In *Hiscox v. Greenwood*<sup>211</sup> a

<sup>207</sup> See post, p. 233.

<sup>208</sup> *Grinnell v. Cook*, 3 Hill (N. Y.) 485; *Bevan v. Waters*, 3 Car. & P. 520, 522; *Jones v. Thurloe*, 8 Mod. 172; *Jones v. Pearle*, 1 Strange, 556; *Sweet v. Pym*, 1 East, 4.

<sup>209</sup> *Jackson v. Cummins*, 5 Mees. & W. 342, 350; *Cross, Liens*, 25, 36, 332.

<sup>210</sup> 1 *Jones, Liens*, § 733; *Clark v. Hale*, 34 Conn. 398; *White v. Smith*, 44 N. J. Law, 105; *Hill v. Burgess*, 37 S. C. 604, 15 S. E. 963. Cf. *M'Intyre v. Carver*, 2 Watts & S. 392. The bailee cannot assert his lien against the true owner of the goods who has never consented to such bailment. *Small v. Robinson*, 69 Me. 425; *Globe Works v. Wright*, 106 Mass. 207; *Gilson v. Gwinn*, 107 Mass. 126; *Hollingsworth v. Dow*, 19 Pick. 228; *Robinson v. Baker*, 5 Cush. 137; *Johnson v. Hill*, 3 Starkie, 172; *Sargent v. Usher*, 55 N. H. 287; *Hanch v. Ripley*, 127 Ind. 151, 26 N. E. 70.

<sup>211</sup> 4 Esp. 174.

coach maker to whom a carriage had been delivered for repairs by the owner's servant was denied a lien where the carriage had been broken by the negligence of the servant, without the knowledge of the master, and had been taken by the servant to the coach maker for repairs, without any orders from his master. In *Hollingsworth v. Dow*<sup>212</sup> the plaintiff had purchased a machine of one Nesbit, in an unfinished state, and had contracted with him to finish it for a stipulated sum. Nesbit employed the defendant, Dow, to finish the machine, without the knowledge or consent of the plaintiff; and it was held, in replevin, that the defendant did not acquire a lien in his own right for his labor upon the machine. In both cases cited, the bailment was entirely without the authority of the owner, and without any circumstances from which his consent could be implied; for although, in *Hollingsworth v. Dow*, the owner knew while the work was in progress that the third party was doing the work, he had contracted with another to do it. It must not, however, be inferred that the consent of the owner to such a bailment must in all cases be given with such formalities or in such a manner as would create a personal liability on his part to pay the charges. The property being improved and enhanced in value by the workman's labor, authority to have it done on the footing of a workman's lien will be implied from circumstances which would not raise an implication of a contract to pay the charges to be enforced by a suit. Thus, where a wife allowed her husband to use her wagon, and he employed a wheelwright to make certain necessary repairs, who charged them to the husband, supposing the wagon to be his, it was held that the wheelwright had a lien for his charges, as against the wife.<sup>213</sup>

*Same—Subcontractors or Servants.*

The lien does not attach in favor of a workman who is hired by the original bailee to do the work. In such case the possession and lien are in the master or contractor.<sup>214</sup> Subcontractors have no

<sup>212</sup> 19 Pick. 228.

<sup>213</sup> *White v. Smith*, 44 N. J. Law, 105.

<sup>214</sup> *Quillian v. Central Railroad & Banking Co.*, 52 Ga. 374. And see *White v. Smith*, 44 N. J. Law, 105.

lien, because there is no privity between them and the owner.<sup>215</sup> "The lien belongs strictly to the person who has contracted with the owner to do the work."<sup>216</sup> So far as the bailee's lien is concerned it is immaterial whether he perform the work personally, or through an agent who is paid a lump sum for the whole work, or through servants employed by the day.<sup>217</sup>

*Same—Priority of Lien.*

The priority of a bailee's lien for services, over other liens, depends upon the circumstances under which the services were rendered. As has been seen, the consent of the owner is essential to the creation of any lien. The holder of a prior mortgage or other lien is regarded, in some respects, as an owner. Unless the services were performed under such circumstances that his consent thereto can be at least implied, his mortgage or lien will be unaffected by the lien.<sup>218</sup> A mortgagor cannot, by contract, create any lien which shall take precedence over the mortgage.<sup>219</sup> Thus, in Bissell v. Pearce<sup>220</sup> it was held that a farmer who, under a special contract for a lien with the owner of horses which were subject to a prior mortgage, kept and fed them during the winter, had no lien on them for the price of the keeping, as against the mortgagee. The contract was one of agistment, for which the common law gave no lien. The lien arose simply by force of the special

<sup>215</sup> *Jacobs v. Knapp*, 50 N. H. 71; *Gross v. Eiden*, 53 Wis. 543, 11 N. W. 9; 1 *Jones, Liens*, § 721.

<sup>216</sup> *Jones, Liens*, § 737.

<sup>217</sup> *Jones, Liens*, § 738; *Hall v. Tittabawssee Boom Co.*, 51 Mich. 377, 16 N. W. 770; *Webber v. Cogswell*, 2 Can. Sup. Ct. 15.

<sup>218</sup> The mortgagee's authority for the creation of a lien may be implied from the mortgagor's being allowed to remain in possession of the chattel and to use it for profit. *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680; *Hammond v. Danielson*, 126 Mass. 294; *Loss v. Fry*, 1 City Ct. R. (N. Y.) 7; *Beall v. White*, 94 U. S. 382; *Scott v. Delahunt*, 5 Lans. (N. Y.) 372; *Id.*, 65 N. Y. 128.

<sup>219</sup> A recorded chattel mortgage on a horse is superior to a subsequent lien of a livery stable keeper, acquired under Mill. & V. Code Tenn. § 2760, where the horse is placed in the stable after the making of the mortgage, without the knowledge of the mortgagee, though the stable keeper had no notice in fact of the mortgage. *McGhee v. Edwards*, 87 Tenn. 506, 11 S. W. 316.

<sup>220</sup> 28 N. Y. 252.



contract under which the service was rendered, and had relation only to the date of the contract. Indeed, it is one of the characteristics of common-law liens, which arise by operation of law, as distinguished from liens created by contract or statute, that the former, as a general rule, override all other rights in the property to which they attach, and the latter are subordinate to all prior existing rights therein.

*Williams v. Allsup* <sup>221</sup> is a leading case on this subject. In that case the plaintiff, a shipwright, detained a vessel for his charges for repairs, as against a mortgagee under a prior mortgage. The mortgage had been recorded pursuant to the merchants' shipping act. The vessel was left in the mortgagor's possession and control, for use, and was condemned as unseaworthy. The shipwright's charges were for necessary repairs, made by the mortgagor's direction, without the knowledge of the mortgagee. The court sustained the shipwright's lien for repairs, against the claim of the mortgagee. The course of reasoning which led to this result, as expressed in the opinions of the judges, is as follows: Erle, C. J., said: "I put my decision on the ground that the mortgagee, having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit, and a means of earning wherewithal to pay off the mortgage debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose. The case states that the vessel had been condemned as unseaworthy by the government surveyor, and so was in a condition to be utterly unable to earn freight, or be an available security or any source of profit at all. Under these circumstances, the mortgagor did that which was obviously for the advantage of all parties interested; he puts her into the hands of the defendant to be repaired; and, according to all ordinary usage, the defendant ought to have a right of lien on the ship, so that those who are interested in the ship, and who will be benefited by the repairs, should not be allowed to take her out of his hands without paying for them. \* \* \* It is to be observed that the money expended in repairs adds to the value of the ship; and, looking to the rights and interests of the

<sup>221</sup> 10 C. B. (N. S.) 417.

parties generally, it cannot be doubted that it is much to the advantage of the mortgagee that the mortgagor should be held to have power to confer a right of lien on the ship for repairs necessary to keep her seaworthy." Willes, J., said: "By the permission of the mortgagees, the mortgagor has the use of the vessel. He has therefore a right to use her in the way in which vessels are ordinarily used. Upon the facts which appear on this case, this vessel could not be so used unless these repairs had been done to her. The state of things, therefore, seems to involve the right of the mortgagor to get the vessel repaired, not on the credit of the mortgagees, but upon the ordinary terms, subject to the shipwright's lien. It seems to me that the case is the same as if the mortgagees had been present when the order for the repairs was given." Byles, J., said: "As it is obvious that every ship will, from time to time, require repairs, it seems but reasonable, under circumstances like these, to infer that the mortgagor had authority from the mortgagees to cause such repairs as should become necessary to be done, upon the usual and ordinary terms. Now, what are the usual and ordinary terms? Why, that the person by whom the repairs are ordered should alone be liable personally, but that the shipwright should have a lien upon the ship for the work and labor he has expended on her. Nor are the mortgagees at all prejudicially affected thereby. They have a property augmented in value by the amount of the repairs."

The doctrine of *Williams v. Allsup* was applied, as against prior mortgagees, by the supreme court of New York, in favor of the lien of a shipwright for the necessary repairs of a canal boat,<sup>222</sup> and by the supreme court of Massachusetts to repairs on a hack described in the mortgage as in use in certain stables.<sup>223</sup> It will be observed that in each of these cases the right of the workman to his lien was placed upon the ground that the value of the chattel was enhanced by the labor of the workman, and that it was presumably the intention of all parties that the chattel should be kept in a proper state of repair; from which facts authority was inferred that the person in possession, and entitled to use it, might have

<sup>222</sup> *Scott v. Delahunt*, 5 Lans. 372; *Id.*, 65 N. Y. 128.

<sup>223</sup> *Hammond v. Danielson*, 126 Mass. 294.

the repairs made upon the usual and ordinary terms; i. e. that, the property having been augmented in value by the repairs, the workman should have a lien on it for the work and labor which enhanced its value, and for which, by the common law, he would be entitled to his lien, if he was lawfully employed to render the services.

*Same—Scope of Lien.*

The bailee's lien for services in respect to chattels is a particular or specific one. It secures only the debt created by services about the specific chattel upon which the lien is claimed.<sup>224</sup> But the lien extends to every portion of the goods delivered under one contract. The whole lien attaches to each and every part of the goods subject to it. If not discharged or waived, it remains attached to whatever part of the property may remain within the possession of the bailee.<sup>225</sup> A delivery of part of the property does not necessarily discharge the lien, either in whole or pro tanto. It releases the part delivered from the lien, but does not discharge the part remaining from the burden of the whole lien, unless it was the intention of the parties to do so. And this is ordinarily a question of fact, for the jury.<sup>226</sup> Where there is an entire contract for making or repairing several articles for a gross sum, the artisan has a lien on any one or more of the articles in his possession, not only for their proportionate part of the sum agreed for repairing the whole, but for such amount as he may be entitled to for services bestowed on any or all of the articles embraced

<sup>224</sup> *Miller v. Marston*, 35 Me. 153, 155; *Mathias v. Sellers*, 86 Pa. St. 486; *Moulton v. Greene*, 10 R. L. 330; *Nevan v. Roup*, 8 Iowa, 207; *Rushforth v. Hadfield*, 6 East, 519; *Green v. Farmer*, 4 Burrows, 2214. Charge for keeping while being held to preserve a lien cannot be added to the sum for which a lien is claimed. *Somes v. British Empire Shipping Co.*, 8 H. L. Cas. 338; *Lord v. Collins*, 76 Me. 443.

<sup>225</sup> When the contract and the work are entire, the lien extends to each part, and may be enforced to the extent of the entire price upon any portion remaining in the possession of the bailee after a partial delivery. *Schmidt v. Blood*, 9 Wend. 268; *Morgan v. Congdon*, 4 N. Y. 552; *Hensel v. Noble*, 95 Pa. St. 345; *Steinman v. Wilkins*, 7 Watts & S. 466; *Myers v. Uptegrove*, 3 How. Prac. (N. S.) 316.

<sup>226</sup> *New Haven & Northampton Co. v. Campbell*, 128 Mass. 104.

in the contract.<sup>227</sup> The fact that the chattels are delivered to the bailee in different parcels, and at different times, is immaterial provided the services are all rendered under one contract.<sup>228</sup>

*Same—General Lien.*

"A general lien differs essentially from a particular lien in this: that, while the latter is a right which grows out of expense or services bestowed on the particular property, the former is a right to retain certain property of another on account of a general balance due from the owner."<sup>229</sup> A general lien is not favored in the law, but it may be created by special contract, or the custom and usage of particular trades.<sup>230</sup> It is also said that a lien exists to secure a general balance due in the case of such bailees as factors, calico printers, packers, fullers, and other like bailees to whom property is delivered, against the several parts of which it is impracticable to keep separate and distinct charges.<sup>231</sup> By analogy, an owner of a sawmill, who has sawed lumber for another at a stipulated price per thousand, has a lien on any such lumber in his possession, for a general balance due him from such person on account of lumber sawed.<sup>232</sup> The general lien does not extend to a balance on all dealings between the parties, but only to the general balance due in that particular course of dealings. Thus, insurance brokers have a lien on all policies in their hands, procured

<sup>227</sup> *Hensel v. Noble*, 95 Pa. St. 345; *Blake v. Nicholson*, 3 Maule & S. 167; *Partridge v. Dartmouth College*, 5 N. H. 286; *McFarland v. Wheeler*, 28 Wend. 467; *Lane v. Old Colony & F. R. R. Co.*, 14 Gray. 143.

<sup>228</sup> *Chase v. Westmore*, 5 Maule & S. 180; *Myers v. Uptegrove*, 3 How. Prac. (N. S.) 316; *Moulton v. Greene*, 10 R. I. 330.

<sup>229</sup> Schouler, *Pers. Prop.* § 382.

<sup>230</sup> Schouler, *Bailm.* (2d Ed.) § 122; 2 Kent, *Comm.* 634; *Story, Ag.* § 355; *Jarvis v. Rogers*, 15 Mass. 389.

<sup>231</sup> 3 Wait, *Act. & Def.* 301; 4 Wait, *Act. & Def.* 319, 320; 7 Wait, *Act. & Def.* 215; *Hanna v. Phelps*, 7 Ind. 21; *Tucker v. Taylor*, 53 Ind. 93; *Mooney v. Musser*, 45 Ind. 115; *East v. Ferguson*, 59 Ind. 169; *Shaw v. Ferguson*, 78 Ind. 547; *Bunnell v. Davisson*, 85 Ind. 557. In England, a wharfinger has by general usage a lien for the general balance due from the owner. *Spears v. Hartly*, 3 Esp. 81. And see *Weldon v. Gould*, 3 Esp. 268; *Savill v. Barchard*, 4 Esp. 53; *Naylor v. Mangles*, 1 Esp. 109; *Rushforth v. Hadfield*, 6 East, 519; *Id.*, 7 East, 224; *Moet v. Pickering*, 8 Ch. Div. 372.

<sup>232</sup> *Holderman v. Manier*, 104 Ind. 118, 3 N. E. 811.

by them for their principals, for the payment of the sums due them for commissions, disbursements, advances, and services in and about the same,<sup>233</sup> but not for the payment of the balance of their general account, embracing items wholly disconnected with the business of the agency.<sup>234</sup>

*Same—Waiver of Lien.*

No lien arises where it is obvious that the parties did not intend that there should be one; and, of course, the party for whose benefit the lien is given may waive it.<sup>235</sup> Where the bailment contract is inconsistent with the existence of a lien,<sup>236</sup> as where a term of credit was provided for,<sup>237</sup> or payment was agreed to be

<sup>233</sup> Story, Ag. § 379; *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268; *McKenzie v. Nevins*, 22 Me. 138; *Olive v. Smith*, 5 Taunt. 57; *Castling v. Aubert*, 2 East, 325.

<sup>234</sup> *McKenzie v. Nevins*, 22 Me. 138.

<sup>235</sup> Schouler, Bailm. (2d Ed.) § 123. Bailee forfeits his lien by receipting to stranger and acknowledging that he holds goods for him, or by refusing to deliver goods to his principal on other grounds, omitting to mention his lien. *Holbrook v. Wight*, 24 Wend. 169.

<sup>236</sup> If there be a special agreement as to mode of payment, or for a future time of payment, there is no lien. *Trust v. Pirsson*, 1 Hilt. 292; *Bailey v. Adams*, 14 Wend. 201; *Murphy v. Lippe*, 35 N. Y. Super. Ct. 542. If the special agreement be broken, it has been held that the bailee may disregard it and assert his lien. *Mount v. Williams*, 11 Wend. 77. Insolvency of bailor will not revive lien when it has been waived by special agreement. *Fieldings v. Mills*, 2 Bosw. 489. Where credit may be claimed by custom, no lien arises. *Raitt v. Mitchell*, 4 Camp. 146; *Crawshay v. Homfray*, 4 Barn. & Ald. 50. If the inconsistent agreement is antecedent to the possession, no lien is created. If it is made afterwards, the lien is waived. 1 Jones, Liens, § 1002; *Raitt v. Mitchell*, 4 Camp. 146, 149; *Crawshay v. Homfray*, 4 Barn. & Ald. 50; *Bailey v. Adams*, 14 Wend. 201; *Dunham v. Pettee*, 1 Daly, 112; *Trust v. Pirsson*, 1 Hilt. (N. Y.) 292; *Chandler v. Belden*, 18 Johns. 157; *Burdiet v. Murray*, 3 Vt. 302; *Pinney v. Wells*, 10 Conn. 103; *Darlington v. Chamberlin*, 20 Ill. App. 443; *Lee v. Gould*, 47 Pa. St. 398; *Pulis v. Sanborn*, 52 Pa. St. 368.

<sup>237</sup> *Hale v. Barrett*, 26 Ill. 195; *Robinson v. Larrabee*, 63 Me. 116; *Tucker v. Taylor*, 53 Ind. 93; *McMaster v. Merrick*, 41 Mich. 505, 2 N. W. 895; *Dunham v. Pettee*, 1 Daly, 112. "The operation of a lien is to place the property in pledge for the payment of the debt; and where the party agrees to give time for payment, or agrees to receive payment in a particular mode, inconsistent with the existence of such a pledge, it is evidence, if nothing appears



made in medical services,<sup>238</sup> there is no lien.<sup>239</sup> Possession is essential to the existence of the lien. Where the bailee voluntarily parts with possession, the lien is waived.<sup>240</sup> A wrongful sale or pledge by the bailee will destroy his lien.<sup>241</sup> After once parting with possession, the lien is not revived by again assuming possession.<sup>242</sup>

*Same—Enforcement of Lien.*

A common-law lien is a mere right to retain the possession until certain demands are satisfied. The bailee has no power of sale, or other remedy, unless given by statute or contract.<sup>243</sup> As has been

to the contrary, that he did not intend to rely upon the pledge of the goods, in relation to which the debt arose, to secure the payment." Per Parker, J., in *Stoddard Woolen Manufactory v. Huntley*, 8 N. H. 441.

<sup>238</sup> *Morrill v. Merrill*, 64 N. H. 71, 6 Atl. 602.

<sup>239</sup> But it must affirmatively appear that the lien is waived. Where the contract is silent on the subject, the law confers a lien. *Hazard v. Manning*, 8 Hun, 613.

<sup>240</sup> *Holderman v. Manier*, 104 Ind. 118, 3 N. E. 811; *Tucker v. Taylor*, 53 Ind. 93; *Nevan v. Roup*, 8 Iowa, 207; *McDougall v. Crapon*, 95 N. C. 292; *Klitteridge v. Freeman*, 48 Vt. 62; *In re Merrick*, 91 Mich. 342, 51 N. W. 890; *King v. Indian Orchard Canal Co.*, 11 Cush. 231; *Stickney v. Allen*, 10 Gray, 352. Delivery of goods to third party, with agreement that lien continues, forfeits lien, unless third person is under control of bailee. *Walther v. Wetmore*, 1 E. D. Smith, 7. A tailor does not lose his lien by allowing the customer to try on the clothes made for him, provided it is done in the tailor's presence. *Hughes v. Lenny*, 5 Mees. & W. 183, 187.

<sup>241</sup> *Rodgers v. Grothe*, 58 Pa. St. 414; *Davis v. Bigler*, 62 Pa. St. 242. The lien is also waived by claiming possession under an adverse title. *Everett v. Saltus*, 15 Wend. 474; *Holbrook v. Wight*, 24 Wend. 169; *Mexal v. Dearborn*, 12 Gray, 336. Lien acquired by partnership not lost by dissolution and assignment by one partner of his interest to the other. *Busfield v. Wheeler*, 14 Allen, 139.

<sup>242</sup> *Hartley v. Hitchcock*, 1 Starkie, 408; *Howes v. Ball*, 7 Barn. & C. 481; *Nevan v. Roup*, 8 Iowa, 207; *Robinson v. Larrabee*, 63 Me. 116; *Hale v. Barrett*, 26 Ill. 195.

<sup>243</sup> 1 Jones, Liens, § 1033; *Jones v. Pearle*, 1 Strange, 557; *Lickbarrow v. Mason*, 6 East, 21, note; *Thames Iron Works Co. v. Patent Derrick Co.*, 1 Johns. & H. 93; *Busfield v. Wheeler*, 14 Allen, 139; *Rodgers v. Grothe*, 58 Pa. St. 414; *Briggs v. Boston & L. R. Co.*, 6 Allen, 246. In *Doane v. Russell*, 3 Gray, 382, Chief Justice Shaw says: "If it be said that a right to retain the goods, without the right to sell, is of little or no value, it may be answered that it is certainly not so adequate a security as a pledge with

seen, this absence of a power of sale is one of the chief distinctions between a pledge and a lien.<sup>244</sup> A power of sale is, however, very generally given by statute.<sup>245</sup> The power of sale, being in derogation of common law, must be strictly construed and followed. A sale without authority constitutes a conversion.<sup>246</sup>

a power of sale; still, it is to be considered that both parties have rights which are to be regarded by the law, and the rule must be adapted to general convenience. In the greater number of cases, the lien for work is small in comparison with the value, to the owner, of the article subject to lien; and in most cases it would be for the interest of the owner to satisfy the lien and redeem the goods, as in the case of the tailor, the coach maker, the innkeeper, the carrier, and others; whereas, many times, it would cause great loss to the general owner to sell the suit of clothes or other articles of personal property. But, further, it is to be considered that the security of this lien, such as it is, is superadded to the holder's right to recover for his services by action."

<sup>244</sup> See ante, p. 106.

<sup>245</sup> "In most of the states there are statutes giving to mechanics, artisans, and others who bestow labor on personal property a lien therefor. The purpose of these statutes is, in general, to extend the common-law lien in respect of the persons who can acquire such lien, and to give an effectual remedy for its enforcement, either by sale after notice, or by attachment and sale under execution. In a few states the lien is extended so that it may be availed of within a limited time after the property has been delivered to the owner. But, generally, these statutes, in most respects, are merely declaratory of the common law, and must be interpreted in accordance with its principles. Especially is this so as regards the necessity of retaining possession of the property in order to retain a lien upon it." Jones, Liens, 749; *McDearmid v. Foster*, 14 Or. 417, 12 Pac. 813; *McDougall v. Crapon*, 95 N. C. 292. "The lien under the statute is of the same nature it formerly was, and the same circumstances must combine to create it. There must be a possession of the thing; otherwise, there cannot, without a special agreement to that effect, be any lien. The term 'lien,' as used in the statute, means the same it ever did,—the right to hold the thing until the payment of the reasonable charges for making, altering, repairing, or bestowing labor upon it. Possession of the article is a requisite essential." *McDearmid v. Foster*, 14 Or. 417, 12 Pac. 813, per Thayer, J.

<sup>246</sup> *Jones v. Pearle*, 1 Strange, 556; *Mulliner v. Florence*, 3 Q. B. Div. 484; *Doane v. Russell*, 3 Gray, 382; *Case v. Fogg*, 46 Mo. 44; *Jones v. Thurloe*, 8 Mod. 172; *Jesurun v. Kent*, 47 N. W. 784. But in an action for such conversion the bailee may set off the amount of his lien. *Briggs v. Bostou & L. R. Co.*, 6 Allen, 246; *Rodgers v. Grothe*, 58 Pa. St. 414, 416.

*Title to Materials Used in Repairs—Accession.*

Where a hired bailee employs his own materials in repairing a thing bailed to him, the title to the materials passes to the bailor, under the doctrine of accession.<sup>247</sup> This principle is an important one, as, in case of accidental destruction of the property before it has been redelivered to the bailor, he must bear the entire loss.<sup>248</sup> The doctrine applies even though the materials added were of greater value than the thing originally. The transaction remains a bailment, and is not a contract of sale.<sup>249</sup> If material is left by the owner with permission to the artisan to return, not the identical materials worked up into a certain thing, but a thing of the sort desired, made from material belonging to the artisan, there would then be a transaction in the nature of a sale, or of a mutuum instead of a bailment.<sup>250</sup>

*Liability for Negligence.*

Innkeepers and common carriers, although bailees for hire, and postmasters and other agents and employes of the post-office department, are subject to exceptional liabilities, imposed by considerations of public policy, and consequently will be considered separately in the succeeding chapters.<sup>251</sup> In all other cases, a bailee for hire is bound to the exercise of ordinary diligence; that is to say, the degree of care which the average business man of ordinary intelligence and prudence exercises under like conditions in the conduct of his own affairs.<sup>252</sup> A failure on the part of the

<sup>247</sup> Story, Bailm. § 423; Schouler, Bailm. (2d Ed.) § 99; 2 Schouler, Pers. Prop. 31-39; 2 Kent, Comm. 360-364.

<sup>248</sup> Ante, p. 216.

<sup>249</sup> Gregory v. Stryker, 2 Denio, 628.

<sup>250</sup> Ante, p. 8.

<sup>251</sup> See post, pp. 254, 304, and 483.

<sup>252</sup> Conner v. Winton, 8 Ind. 315. Exception as to public officer, who is absolutely liable. Board of Education of Village of Pine Island v. Jewell, 44 Minn. 427, 46 N. W. 914. An agreement to carry or deliver property for a reward, made by one who is not a common carrier, creates the duty to exercise reasonable care, but does not impose a liability on him for losses not occasioned by the ordinary negligence of himself or servants. American Dist. Tel. Co. v. Walker, 72 Md. 454. When one delivers logs at a custom saw-mill, to be sawed at agreed price, the owner of the mill becomes bound to exercise ordinary care in keeping and manufacturing the logs, and, in case

bailee to exercise ordinary diligence is ordinary negligence, and will subject him to liability for loss or injury of the thing, resulting therefrom. On the other hand, if the bailee has exercised such ordinary diligence in carrying out the bailment undertaking, and without fault on his part the thing intrusted to him perishes by inevitable accident, or by reason of its defective nature,<sup>253</sup> or by the act of public enemies,<sup>254</sup> the fact that he has used such ordinary care and diligence will exonerate him from blame or liability for its loss or destruction.<sup>255</sup> If the bailee has wrongfully exposed the thing to injury by irresistible force, or if, after such injury, he has carelessly neglected to take measures to prevent, as far as possible, further ill effects from resulting to the thing in consequence of such injury, the fact that the real cause of the injury was irresistible force will not excuse him.<sup>256</sup> In accordance with the doc-

of their loss, to prove that it was without his fault. *Gleason v. Beers' Estate*, 59 Vt. 581, 10 Atl. 86. Cotton ginner is held only to ordinary diligence and care in custody of cotton delivered to him to be ginned. *Kelton v. Taylor*, 11 Lea, 264. As to liability of banks as collecting agents, see *German Nat. Bank v. Burns*, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247, and note; *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031; *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289, 307, and extended note. As to some other special cases, see post, p. 238.

<sup>253</sup> *Story*, Bailm. § 437; *Norway Plains Co. v. Boston & M. R. R.*, 1 Gray, 263; *Francis v. Dubuque & Sioux City R. Co.*, 25 Iowa, 60; *McCullom v. Porter*, 17 La. Ann. 89; *Waller v. Parker*, 5 Cold. (Tenn.) 476; *Cowles v. Pointer*, 26 Miss. 253; *Johnson v. Smith* (Minn.) 56 N. W. 37; *Safe-Deposit Co. of Pittsburgh v. Pollock*, 85 Pa. St. 391; *Chenowith v. Dickinson*, 8 B. Mon. (Ky.) 156; and see post, p. 368.

<sup>254</sup> *Abraham v. Nunn*, 42 Ala. 51; *Smith v. Frost*, 51 Ga. 336; *Waller v. Parker*, 5 Cold. 476; *Yale v. Oliver*, 21 La. Ann. 454; post, p. 364.

<sup>255</sup> *Waller v. Parker*, 5 Cold. (Tenn.) 476. Unless he has taken such risks upon himself by the special contract. *Story*, Bailm. § 437; *Russell v. Koehler*, 66 Ill. 459.

<sup>256</sup> *Leck v. Maestaer*, 1 Camp. 138; *Smith v. Meegan*, 22 Mo. 150; *James v. Greenwood*, 20 La. Ann. 297. See, also, *Story*, Bailm. § 444; *Platt v. Hibbard*, 7 Cow. (N. Y.) 497; *Schmidt v. Blood*, 9 Wend. 268; *Chenowith v. Dickinson*, 8 B. Mon. 156; *Claffin v. Meyer*, 43 N. Y. Super. Ct. 1. One who undertakes to repair a boat, and places her upon marine railways upon bank of river for that purpose, is bound to use at least ordinary care for preservation thereof. He is liable in damages for her destruction if he launches her into river at time and under circumstances of great danger,

trine of proximate and remote cause, if, immediately after an injury resulting from the bailee's negligence, an accident happens, independent of the bailee's negligence, by which the thing is destroyed, the bailee is nevertheless liable for the damage caused by his negligence, since his negligence was the proximate cause of the injury.<sup>257</sup> If, however, the bailee is negligent, but his negligence is not the cause of the injury, he is not liable merely by reason of his negligence.<sup>258</sup> The question of what is the proper diligence to be exercised by the bailee is largely a matter of fact, and varies with the attendant circumstances, and is also dependent upon the nature of the thing, the class of the bailee, and the usages commonly followed by others of his class.<sup>259</sup> Where a hired bailee has undertaken to perform a certain work, the proper execution of which requires skill, a failure to possess and exercise that degree of skill which is ordinarily possessed by others engaged in that particular line of employment is ordinary negligence.<sup>260</sup> The par-

which he ought to have foreseen, and which caused destruction of boat in spite of her owner's efforts to save her. This, although the loss was occasioned by breaking up of the ice, and 12 days after launching. *Smith v. Meegan*, 22 Mo. 150.

<sup>257</sup> *Powers v. Mitchell*, 3 Hill, 545; *Francis v. Castleman*, 4 Bibb, 282; *Clafin v. Meyer*, 43 N. Y. Super. Ct., 1; *McGinn v. Butler*, 31 Iowa, 160. See *Stevens v. Boston & M. R. R.*, 1 Gray, 277.

<sup>258</sup> A want of ordinary care in one particular, on the part of a warehouseman, does not render him responsible for a loss occasioned by other causes not connected with that particular. *Gibson v. Hatchett*, 24 Ala. 201. See, also, 2 Jag. Torts, "Connection as Cause," 929, 975.

<sup>259</sup> Usage may be shown to qualify liability of bailee. *Kelton v. Taylor*, 11 Lea (Tenn.) 264. In *Brown v. Hitchcock*, 28 Vt. 452, 457, it was shown that the defendant received from the plaintiff a quantity of palm leaf, agreeing to manufacture the same into hats, or to return it to plaintiff on demand. While in the hands of the defendant, the leaf was injured by heat and mildew. *Isham, J.*, said: "We perceive no objection to the admission of the testimony in relation to the usage and custom in packing leaf for market, as also the necessity and custom of taking the leaf from the sacks and exposing it to air to prevent its becoming injured and worthless. Its object was simply to ascertain the character and degree of care which the defendant should have exercised, and that which he did exert over the property while it was in his possession."

<sup>260</sup> *Kuehn v. Wilson*, 13 Wis. 116; *Hillyard v. Crabtree's Adm'r*, 11 Tex. 264; *Smith v. Meegan*, 22 Mo. 150; *Baird v. Daly*, 57 N. Y. 236; *Money Penny*



ties may, of course, stipulate for a different degree of care, or as to the manner in which the service shall be performed. If the services be performed in the agreed manner, the bailee is not liable for the consequences.<sup>261</sup> So, also, the bailor's knowledge of the bailee's character, skill, and means of performance may affect the understanding as to the degree of care and skill to be exercised. Where the particular business or employment requires skill, if the bailee is known not to possess it, or he does not exercise the particular art or employment to which it belongs, and he makes no pretension to skill in it, there, if the bailor, with full notice, trusts him with the undertaking, the bailee is bound only for a reasonable exercise of the skill which he possesses, or of the judgment which he can employ; and, if any loss ensues from his want of due skill, he is not chargeable.<sup>262</sup> Thus, if a person will knowingly employ a common mat maker to weave or embroider a fine carpet, he must impute the bad workmanship to his own folly.<sup>263</sup> So, if a man who has a disorder in his eyes should employ a farrier to cure the disease, and he should lose his sight by using the remedies prescribed in such cases for horses, he would certainly have no legal ground of complaint.<sup>264</sup> In all such cases the employer ought properly to attribute the loss or injury to his own rashness, folly, or negligence.

End Sat Jan 25th.

#### 45. SAME—SPECIFIC BAILMENTS CONSIDERED.

##### *Warehousemen—Liability for Negligence.*

A warehouseman is one who receives goods and merchandise to be stored in his warehouse for hire.<sup>265</sup> Warehousemen are bound

v. Hartland, 1 Car. & P. 352; Id., 2 Car. & P. 378; Duncan v. Blundell, 3 Starkie, 6; Gamber v. Wolaver, 1 Watts & S. 60; Farnsworth v. Garrard, 1 Camp. 28; Moore v. Mourgue, Cowp. 479.

<sup>261</sup> Story, Bailm. § 431; Schouler, Bailm. (2d Ed.) § 105. Where the employer supersedes the judgment of the workman, and insists that his own plan be followed, the workman is not liable for any losses resulting from pursuing such method. Duncan v. Blundell, 3 Starkie, 6.

<sup>262</sup> Jones, Bailm. 63, 98-100; Coggs v. Bernard, 2 Ld. Raym. 909, 914, 915; 1 Bell, Com. (5th Ed.) p. 459; Id. (4th Ed.) § 394.

<sup>263</sup> Jones, Bailm. 99, 100.

<sup>264</sup> Story, Bailm. § 435; Jones, Bailm. 99, 100. For a discussion of the general principles of negligence, see ante, cc. 1, 2.

<sup>265</sup> 2 Bouv. Law Dict. 799.

to only common and reasonable care of the goods intrusted to their charge.<sup>266</sup> They must exercise reasonable care to provide buildings reasonably fit and safe for storage.<sup>267</sup> In the place as well as the method of storage, ordinary care should be taken, according to circumstances.<sup>268</sup> While ordinarily a warehouseman will not be liable for losses caused by accidental fire, yet if he should have

<sup>266</sup> Warehousemen are only ordinary bailees for hire, and are bound only to common care and diligence, and are liable only for want of such diligence or care. *Edw. Bailm.* 254; *Jones, Bailm.* 97; *Story, Bailm.* § 444; *Calliff v. Danvers, Peake*, 155; *Foote v. Storrs*, 2 Barb. 326, 328; *Bogert v. Haight*, 20 Barb. 251; *Myers v. Walker*, 31 Ill. 353; *Buckingham v. Fisher*, 70 Ill. 121; *Hatchett v. Gibson*, 13 Ala. 587; *Dimmick v. Milwaukee & St. P. Ry. Co.*, 18 Wis. 494; *McCullom v. Porter*, 17 La. Ann. 89; *Blin v. Mayo*, 10 Vt. 56, 59; *Taylor v. Secrist*, 2 Disn. (Ohio) 299; *Cowles v. Pointer*, 26 Miss. 253; *Rodgers v. Stophel*, 32 Pa. St. 111; *Ducker v. Barnett*, 5 Mo. 97; *Insurance Co. v. Kiger*, 103 U. S. 352. A warehouseman is not liable as a common carrier, but only for ordinary diligence. *Ducker v. Barnett*, 5 Mo. 97; *Cincinnati & Chicago Air Line R. Co. v. McCool*, 26 Ind. 140; *Holtzelaw v. Duff*, 27 Mo. 392; *Titsworth v. Winnegar*, 51 Barb. (N. Y.) 148; *Knapp v. Curtis*, 9 Wend. (N. Y.) 60. The duty of warehousemen imposes on them the exercise of ordinary care only, or, in other words, the care and diligence which good and capable warehousemen are accustomed to show under similar circumstances. *Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1, 14 S. W. 317. Whatever a diligent man would deem necessary, under any given circumstances, for the preservation of his own property, must be done by the individual, or corporation, or city, that undertakes, for hire, the preservation of property for the public. *Willey v. Allegheny City*, 118 Pa. St. 490, 12 Atl. 453.

<sup>267</sup> *Moulton v. Phillips*, 10 R. I. 218; *Walden v. Finch*, 70 Pa. St. 460. See *Hickey v. Morrell*, 102 N. Y. 454, 7 N. E. 321. Cf. *Hallock v. Mallett*, 55 N. Y. Super. Ct. 265. The law does not require a warehouseman to construct his buildings secure from all possible contingencies. If they are reasonably and ordinarily safe against ordinary and common occurrences, it is sufficient. *Cowles v. Pointer*, 26 Miss. 253.

<sup>268</sup> *Schouler, Bailm.* (2d Ed.) § 102; *Hatchett v. Gibson*, 13 Ala. 587; *Jones v. Hatchett*, 14 Ala. 743; *Chenoweth v. Dickinson*, 8 B. Mon. 156; *Moulton v. Phillips*, 10 R. I. 218. The bailee may show that the bailor approved of the place of storage, and that the goods were damp when delivered, and liable to mildew; and the bailor, that the goods were in the ordinary trade condition, and that the bailee knew they should have been aired and dried. *Brown v. Hitchcock*, 28 Vt. 452. Where a bailee to store cotton for hire permitted it to remain with the roping off, the bagging torn,

stored the goods in a fireproof room,<sup>269</sup> or was negligent in failing to remove them to a place of safety after knowledge of the danger,<sup>270</sup> he is liable. So, also, warehousemen are not liable for losses caused by rats<sup>271</sup> or thieves,<sup>272</sup> where they have taken all reasonable precautions. In *Chenowith v. Dickinson*<sup>273</sup> it appeared that 900 barrels of salt were stored in a frame warehouse, on an alley. Two hundred and forty barrels were stolen, in quantities ranging from 20 to 25 barrels a day, so that the entire 240 barrels were taken at about 10 different times, running through a period of 1 month. It was held that the defendants were negligent in failing to exercise any further care or supervision after placing the salt in the warehouse.

*Same—Presumption of Negligence—Burden of Proof.*

Warehousemen are to be charged only upon proof of their negligence, or that of their servants. The burden of proof is on the

the cotton loose, and the under bales in the mud, whereby it was much injured, held, that it was a want of ordinary care. *Morehead v. Brown*, 6 Jones (N. C.) 367.

<sup>269</sup> A warehouseman who agrees to store the property in a fireproof building is liable for any loss caused by his failure to do so. *Vincent v. Rather*, 31 Tex. 77. See, also, *Jones v. Hatchett*, 14 Ala. 743; *Hatchett v. Gibson*, 13 Ala. 587; *Hamilton v. Elstner*, 24 La. Ann. 453.

<sup>270</sup> *Hamilton v. Elstner*, 24 La. Ann. 455.

<sup>271</sup> *Cailliff v. Danvers*, 1 Peake, 155. The constant presence of a terrier dog is sufficient precaution (*Taylor v. Secrist*, 2 Disn. [Ohio] 299, 301); or of a cat (*Cailliff v. Danvers*, 1 Peake, 155; *Aymar v. Astor*, 6 Cow. [N. Y.] 266, 267). But see, contra, *Laveroni v. Drury*, 16 Jur. 1024, 22 L. J. Exch. 2.

<sup>272</sup> *Moore v. Mobile*, 1 Stew. (Ala.) 284; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Vere v. Smith*, 1 Vent. 121; *Coke*, Inst. 89a; *Southcote v. Bennet*, 4 Coke, 83b; *Lamb v. Western Railroad Corp.*, 7 Allen (Mass.) 98; *Cass v. Boston & Lowell R. Co.*, 14 Allen (Mass.) 448; *Claffin v. Meyer*, 75 N. Y. 260; *Platt v. Hibbard*, 7 Cow. (N. Y.) 497; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268; *Williamson v. New York, N. H. & H. R. Co.* (Super. Ct. N. Y.) 4 N. Y. Supp. 834; *Williams v. Holland*, 22 How. Prae. 137; *Berry v. Marix*, 16 La. Ann. 248. Warehousemen not chargeable with negligence are not answerable for goods intrusted to them, in case of robbery, or when embezzled by their storekeeper or servant; and the onus of showing negligence is on the owner. *Schmidt v. Blood*, 9 Wend. (N. Y.) 268; *Moore v. Mayor, etc., of Mobile*, 1 Stew. (Ala.) 284.

<sup>273</sup> 8 B. Mon. (Ky.) 156.

plaintiff.<sup>274</sup> But a failure or refusal by a warehouseman to deliver on demand goods intrusted to him, or a return of the goods in a damaged condition, is *prima facie* evidence of negligence sufficient to cast upon him the burden of accounting for nondelivery.<sup>275</sup> In other words, the burden of proving negligence rests on plaintiff

<sup>274</sup> *Draper v. Delaware & H. Canal Co.*, 118 N. Y. 118, 23 N. E. 131; *Platt v. Hibbard*, 7 Cow. (N. Y.) 497, 500, note; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268; *Jackson v. Sacramento Val. R. Co.*, 23 Cal. 269; *Clark v. Spence*, 10 Watts (Pa.) 335; *Smith v. First Nat. Bank in Westfield*, 99 Mass. 605; *Gay v. Bates*, 99 Mass. 263; *Lamb v. Western Railroad Corp.*, 7 Allen (Mass.) 98; *Willett v. Rich*, 142 Mass. 356, 7 N. E. 776; *Runyan v. Caldwell*, 7 Humph. (Tenn.) 134; *Browne v. Johnson*, 29 Tex. 40; *Cross v. Brown*, 41 N. H. 283, 289; *Denton v. Chicago, R. I. & P. R. Co.*, 52 Iowa, 161, 2 N. W. 1093; *Finucane v. Small*, 1 Esp. 315; *Clay v. Willan*, 1 H. Bl. 298; *Gilbart v. Dale*, 5 Adol. & E. 543.

<sup>275</sup> *Claffin v. Meyer*, 75 N. Y. 260; *Coleman v. Livingston*, 36 N. Y. Super. Ct. 32; *Id.*, 45 How. Prac. (N. Y.) 483; *Golden v. Romer*, 29 Hun (N. Y.) 438; *Wilson v. Southern Pac. R. Co.*, 62 Cal. 164; *Boies v. Hartford & N. H. R. Co.*, 37 Conn. 272; *Reed v. Crowe*, 13 Daly (N. Y.) 164; *Cox v. O'Riley*, 4 Ind. 368; *Clark v. Spence*, 10 Watts (Pa.) 335; *Burnell v. New York Cent. R. Co.*, 45 N. Y. 184; *Fairfax v. New York Cent. & H. R. R. Co.*, 67 N. Y. 11; *Schwerin v. McKie*, 51 N. Y. 180. The proof that the goods have been lost or stolen must be clear, in order to overcome plaintiff's *prima facie* case. *Williamson v. New York, N. H. & H. R. Co.* (Super. Ct. N. Y.) 4 N. Y. Supp. 834; *Arent v. Squire*, 1 Daly (N. Y.) 347; *Clark v. Spence*, 10 Watts (Pa.) 335; *Leoncini v. Post*, 13 N. Y. Supp. 825. But when such fact is satisfactorily established, plaintiff must prove that the loss was caused by defendant's negligence, in order to recover. *Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1, 14 S. W. 317; *Coleman v. Livingston*, 45 How. Prac. 483; *Babeock v. Murphy*, 20 La. Ann. 399; *McCullom v. Porter*, 17 La. Ann. 89. A warehouseman who fails to deliver property bailed to him is bound to show that the loss occurred without a want of ordinary care and diligence on his part, but not necessarily the precise manner in which the loss occurred. *Lichtenhelm v. Boston & P. R. Co.*, 11 Cush. (Mass.) 70. Bailee is presumed to have been negligent, and burden of proof rests upon him of showing exercise of such care as was required by nature of the bailment, in case of compensated as well as in gratuitous bailments, where bailor shows, in action against bailee to recover damages for injury to or loss of goods bailed, that goods were placed in hands of bailee in good condition, and that they were returned in damaged state or not at all. *Oumins v. Wood*, 44 Ill. 416.

throughout, but the weight of evidence may shift.<sup>276</sup> In *Clafin v. Meyer*<sup>277</sup> it was said: "It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it, against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not, of course, intended to hold that a warehouseman refusing to deliver goods can impose any necessity of proof upon the owner, by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is, in these cases, any real 'shifting' of the burden of proof. The warehouseman, in the absence of bad faith, is only liable for negligence. The plaintiff must, in all cases, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman, and his refusal to deliver, these facts, unexplained, are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman." "The doctrine deducible from these authorities seems to be this: A bailor seeking to recover from a warehouseman for the nondelivery of goods, or an injury thereto, must prove negligence. When he shows that the goods were not delivered on demand, or were delivered in a damaged condition, he has made a *prima facie* case. If the defendant accounts for the nondelivery or injury by showing that the goods were stolen, or were lost or damaged by fire, or in any other manner consistent with the exercise of ordinary care on his part, the plaintiff's *prima facie* case is overcome, and he must prove positive negligence occasioning the loss."<sup>278</sup>

*Same—Duty to Redeliver Thing Bailed.*

A bailee for safe-keeping must return the thing bailed to the bailor, or according to his directions. He cannot require proof that

<sup>276</sup> The burden of proof never shifts. *Willett v. Rich*, 142 Mass. 356, 360, 7 N. E. 776.

<sup>277</sup> *Clafin v. Meyer*, 75 N. Y. 260.

<sup>278</sup> Editor's note to *Schmidt v. Blood*, 24 Am. Dec. 143, 153. The cases are very conflicting.



the bailor is also the owner.<sup>279</sup> Delivery to a third person by mistake or negligence makes a warehouseman liable for conversion.<sup>280</sup> It is the custom of warehousemen, on receiving goods for storage, to give a receipt or delivery order, upon presentation of which the goods are to be surrendered to the bailor or his order. "The indorsement and delivery of the receipt of the warehouseman, in the course of trade, passes the title and right of possession of the property to the party to whom it is so indorsed and delivered."<sup>281</sup> A warehouse receipt, in the absence of statute, is not negotiable. Warehousemen who have given receipts for grain stored with them for hire cannot be heard to dispute the title of an indorsee who has loaned money in good faith upon the receipts, or aver that they did not receive the property on the terms specified.<sup>282</sup> When a warehouse receipt provides that the warehouseman need not deliver the property, except on the written order of the bailor, the bailee cannot justify a refusal to deliver to a person succeeding to the ownership on the ground of nonpresentation of a written order of such former owner, where the claimant can otherwise prove his title.<sup>283</sup>

*Same—When Liability Begins and Ends.*

One of the most important questions which arise in respect to warehousemen is to ascertain when their liability as such begins and ends, or, in other words, when their duty of custody commences and finishes. The question is of especial importance and nicety where the bailee sustains the successive relation of carrier and warehouseman to the goods bailed. As carriers and warehousemen are subject to very different liabilities, the question is of great practical importance. This branch of the subject will be fully discussed

<sup>279</sup> McCafferty v. Brady (Pa. Sup.) 9 Atl. 37.

<sup>280</sup> Lichtenhein v. Boston & P. R. Co., 11 Cush. (Mass.) 70; Bank of Oswego v. Doyle, 91 N. Y. 32. A warehouseman who is the actor, and has delivered to the wrong person through mistake or negligence, is liable in trover. Alabama & T. R. R. Co. v. Kidd, 35 Ala. 209; Willard v. Bridge, 4 Barb. (N. Y.) 361; Devereux v. Barclay, 2 Barn. & Ald. 702; Jeffersonville R. Co. v. White, 6 Bush, 251; Collins v. Burns, 63 N. Y. 1.

<sup>281</sup> Harris v. Bradley, 2 Dill. (U. S.) 284.

<sup>282</sup> Babcock v. People's Sav. Bank, 118 Ind. 212, 20 N. E. 732. But see Hudmon v. Du Bose, 85 Ala. 446; 5 South. 162.

<sup>283</sup> Willner v. Morrell, 40 N. Y. Super. Ct. 222.

in the chapter on Carriers.<sup>284</sup> In general, the liability as warehouseman begins only when the goods have been delivered on his premises, and expressly or impliedly received by him.<sup>285</sup> It has been held that as soon as the goods arrive, and the crane of the warehouse is applied to raise them into the warehouse, the liability of the warehouseman commenced.<sup>286</sup> If a warehouseman consents to take charge of goods before they reach the warehouse, he is liable from that moment.<sup>287</sup> The liability of a warehouseman ends with his delivery of the property to the person rightfully entitled to it. So, where wheat is discharged into a vessel through a pipe controlled by the vessel, the warehouseman's liability ends with the discharge into the pipe.<sup>288</sup> Where the property is taken from his possession without fault on his part, or lost by means for which he is not responsible, liability ceases.<sup>289</sup>

*Same—Confusion of Goods.*

If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it. Where, however, the owners consent to have their wheat mixed in a common mass, each remains the owner of his share in the common stock. If the wheat is delivered in pursuance of a contract for bailment, the mere fact that it is mixed with a mass of like quality, with the knowledge of the depositor or bailor, does not con-

<sup>284</sup> See post, p. 301.

<sup>285</sup> *Rodgers v. Stophel*, 32 Pa. St. 111; *Blin v. Mayo*, 10 Vt. 56. See, also, *Titsworth v. Winnegar*, 51 Barb. 148. A warehouseman cannot have possession of another's property, with its accompanying duties and responsibilities, forced upon him against his will. *Delaware, L. & W. R. Co. v. Central Stockyard Co.*, 45 N. J. Eq. 50, 17 Atl. 146. A warehouseman is responsible for the safety and security of goods after delivery in the warehouse on Sunday, the safe-keeping of goods being a work of necessity. *Powhatan Steamboat Co. v. Appomattox R. Co.*, 24 How. 247.

<sup>286</sup> *Thomas v. Day*, 4 Esp. 262. See, also, *De Mott v. Laraway*, 14 Wend. 225; *Randleson v. Murray*, 8 Adol. & E. 109; *Merritt v. Old Colony & N. R. Co.*, 11 Allen, 80; *Jeffersonville R. Co. v. White*, 6 Bush (Ky.) 251, 252.

<sup>287</sup> *Ducker v. Barnett*, 5 Mo. 65.

<sup>288</sup> *The R. G. Winslow*, 4 Biss. 13, Fed. Cas. No. 11,736.

<sup>289</sup> *Sessions v. Western R. Corp.*, 16 Gray, 132. Cf. *Smith v. Frost*, 51 Ga. 336.

vert that into a sale which was originally a bailment; and the bailee of the whole can, of course, have no greater control of the mass than if the share of each were kept separate.<sup>290</sup> If the commingled mass has been delivered on simple storage, each is entitled, on demand, to receive his share; if for manufacture into flour, to his proper proportion of the product.<sup>291</sup> It makes no difference that the bailee had, in like manner, contributed to the mass of his own wheat; for, although the absolute owner of his own share, he still stands as a bailee to the others, and he cannot abstract more than that share from the common stock without a breach of the bailment, which will subject him not only to a civil suit, but possibly, also, to a criminal prosecution.<sup>292</sup> But where the understanding of the parties was that the person receiving the grain might take from it, or from the flour, at his pleasure, and appropriate the same to his own use, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depository, and the transaction is a sale, and not a bailment.<sup>293</sup>

<sup>290</sup> Bretz v. Diehl, 117 Pa. St. 589, 11 Atl. 893.

<sup>291</sup> Chase v. Washburn, 1 Ohio St. 244. See, also, Hutchinson v. Com., 82 Pa. St. 472; Bretz v. Diehl, 117 Pa. St. 589, 11 Atl. 893.

<sup>292</sup> Hutchinson v. Com., 82 Pa. St. 472.

<sup>293</sup> Bretz v. Diehl, 117 Pa. St. 589, 11 Atl. 893. To the same effect are Schindler v. Westover, 99 Ind. 395; Richardson v. Olmstead, 74 Ill. 213; Bailey v. Bensley, 87 Ill. 556; and Johnston v. Browne, 37 Iowa, 200. In Lyon v. Lenon, 106 Ind. 567, 7 N. E. 311, the distinction is thus stated: "If the dealer has the right, at his pleasure, either to ship and sell the same on his own account, and pay the market price on demand, or retain and redeliver the wheat, or other wheat in the place of it, the transaction is a sale. It is only when the bailor retains the right from the beginning to elect whether he will demand the redelivery of his property, or other of like quality and grade, that the contract will be construed to be one of bailment. If he surrender to the other the right of election, it will be considered a sale, with an option on the part of the purchaser to pay either in money or property, as stipulated. The distinction is, can the depositor, by his contract, compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment; if the dealer has the option to pay for it in money or other wheat, it is a sale." See, also, Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. 244; Chase v. Washburn, 1 Ohio St. 244. If the transaction constitutes a bailment, it is converted into a sale whenever the bailee disposes of the grain. Nelson v. Brown, 44 Iowa, 455. The delivery of grain for storage in a warehouse is a bailment, under the Minnesota statute (Ge-

*Forwarding Merchants.*

"There is a class of persons, well known in this country, who are called 'forwarding merchants,' and who usually combine in their business the double character of warehousemen and agents, for a compensation, to forward goods to their destination. This class of persons is especially employed upon our canals and railroads, and in our coasting navigation by steam vessels and other packets. The law is that persons so employed, if they have no concern in the vehicle by which the goods are sent, and have no interest in the freight, are not liable as common carriers, but are, of course, liable like warehousemen and common agents; that is, for ordinary diligence, and for that only."<sup>294</sup> Forwarding merchants have been largely

St. 1878, c. 124, § 13; Gen. St. 1894, § 7645), and the title thereto remains in the depositor, who is deemed to be the owner of grain in the warehouse to the amount of his deposit, although the identical grain that he deposited may have been removed, and other grain of like kind and quality substituted in its stead. *Hall v. Pillsbury*, 43 Minn. 33, 44 N. W. 673. In many states it is held, even in the absence of statute, that when a warehouseman receives grain to be stored, and with the owner's assent places it in a common bin with his own grain and that received from other depositors, and sells therefrom, retaining always sufficient to supply each owner, the contract remains one of bailment. *Bottenberg v. Nixon*, 97 Ind. 106; *Sexton v. Graham*, 53 Iowa, 181, 4 N. W. 1090; *Nelson v. Brown*, 53 Iowa, 535, 5 N. W. 719; *Irons v. Kentner*, 51 Iowa, 88, 50 N. W. 73; *Ledyard v. Hibbard*, 48 Mich. 421, 12 N. W. 637. See, also, *Morningstar v. Cunningham*, 110 Ind. 328, 336, 11 N. E. 593. The depositors, in such case, are tenants in common of the entire amount in store, though its identity has been completely changed by continued additions and subtractions. *Sexton v. Graham*, 53 Iowa, 181, 4 N. W. 1090; *Arthur v. Chicago, R. I. & P. R. Co.*, 61 Iowa, 648, 17 N. W. 24; *Dole v. Olmstead*, 36 Ill. 150; *Andrews v. Richmond*, 34 Hun, 20; *Nelson v. Brown*, 53 Iowa, 535, 5 N. W. 719. See extensive note in 6 Am. Law Rev. p. 450; also, 24 Am. Dec. 143, 145.

<sup>294</sup> Ang. Carr. § 75. And see *Schouler*, Bailm. (2d Ed.) § 351; *Story*, Bailm. §§ 444, 502; 2 Kent, Comm. 591, 592; *Platt v. Hibbard*, 7 Cow. (N. Y.) 497; *Maybin v. South Carolina R. Co.*, 8 Rich. (S. C.) 240; *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen (Mass.) 254; *Stannard v. Prince*, 64 N. Y. 300; *Roberts v. Turner*, 12 Johns. (N. Y.) 232; *Brown v. Denison*, 2 Wend. (N. Y.) 593; *Bush v. Miller*, 13 Barb. (N. Y.) 481, 488; *Holtzclaw v. Duff*, 27 Mo. 392. Ordinary diligence in forwarding by responsible persons discharges the forwarding merchant from liability. *Brown v. Denison*, 2 Wend. (N. Y.) 593. Where the contract is either expressly or impliedly for the transportation of

superseded by express companies, who combine their functions with those of a common carrier. It is often a matter of extreme difficulty and importance to determine whether a bailee is acting in the capacity of a forwarder or a carrier. This question will be discussed in the chapter on Carriers.<sup>295</sup>

### *Wharfingers.*

A wharfinger is one who owns or keeps a wharf for the purpose of receiving and shipping merchandise to or from it for hire.<sup>296</sup> The liabilities of a wharfinger are not in any respect distinguishable from those of warehousemen. He is responsible only for reasonable and ordinary care in securing the property from loss.<sup>297</sup> At what time the responsibility of a wharfinger begins and ends, depends upon the question when he acquires, and when he ceases to have, the custody of the goods in that capacity. His responsibility begins when the goods are delivered on the wharf, and he has, either expressly or by implication, received them.<sup>298</sup> This is generally governed by the usages of the particular trade or business. Where goods are in the wharfinger's possession, to be sent on board of a vessel for a voyage, as soon as he delivers the possession and care of them to the proper officers of the vessel, although they are not actually removed, he is, by the usages of trade, deemed exonerated from any further responsibility, and the goods are deemed to be in the constructive possession of the officers of the ship.<sup>299</sup> On the other hand, a mere delivery of goods at a wharf is not necessarily a delivery of them to the wharfinger; but there must be some act or assent on his part, or on that of his servants or agents, to the custody thereof, before he will be deemed to have assumed the char-

the goods, the bailee's liability is that of a common carrier, though he is not in fact interested in the vessel in which the goods are carried. *Teall v. Sears*, 9 Barb. 317; *Ladue v. Griffith*, 25 N. Y. 364.

<sup>295</sup> Post, p. 301.

<sup>296</sup> *Rodgers v. Stophel*, 32 Pa. St. 111.

<sup>297</sup> *Id.*

<sup>298</sup> *Rodgers v. Stophel*, 32 Pa. St. 111; *Blin v. Mayo*, 10 Vt. 53.

<sup>299</sup> A wharfinger who has illegally detained goods, which the owner has since agreed to accept and send for, is not liable for their destruction by fire, without his fault, after the owner has had a reasonable time to remove them. *Carms v. Nichols*, 10 Gray, 369. See, also, *Merritt v. Old Colony & N. R. Co.*, 11 Allen, 80, 83; *Gass v. New York, P. & B. R. Co.*, 99 Mass. 227.



acter of custodian.<sup>300</sup> A wharfinger, like other depositaries for hire, has a lien on the goods for his wharfage.<sup>301</sup> But, in case of a sale of the thing by the owner, the lien attaches only to the amount of the debt existing at the time when he has notice of the sale, and not for any after-accruing debt.<sup>302</sup>

### *Safe-Deposit Companies.*

It is an interesting question, and one upon which the reports throw little light, to determine whether safe-deposit companies are liable as bailees. It seems to have been assumed, without much consideration, that such companies are bailees for hired custody.<sup>303</sup> Thus, in a recent New York case,<sup>304</sup> a safe-deposit company was said to be a bailee or depositary for hire, and the whole opinion proceeds upon that theory. In that case a safe-deposit company was held liable for permitting property to be removed from a vault rented by it to plaintiff, under color of legal process, which in fact did not authorize the officers to seize the property. It was not necessary, however, to a decision of that case, to pronounce the defendant a bailee, as it was clearly liable for breach of its contract undertaking. So, where a safe-deposit company agreed to "keep a constant and adequate guard over and upon the burglar-proof safe," it was held that the mere disappearance of plaintiff's bonds from the safe was prima facie evidence of negligence.<sup>305</sup> The decision in each of the foregoing cases was doubtless correct, but whether the transactions involved were bailments, or not, is another question. In the ordinary course of their business, safe-deposit companies rent safes or boxes in their vaults to depositors, engaging to maintain a guard over the vaults, but retaining no right of access in themselves. It does not

<sup>300</sup> Buckman v. Levi, 3 Camp. 414; Gibson v. Inglis, 4 Camp. 72; Packard v. Getman, 6 Cow. 757.

<sup>301</sup> Johnson v. The McDonough, Gilp. 101, Fed. Cas. No. 7,395; Ex parte Lewis, 2 Gall. 483, Fed. Cas. No. 8,310; Vaylor v. Mangles, 1 Esp. 109; Spears v. Hartly, 3 Esp. 81; Holderness v. Collinson, 7 Barn. & C. 212. See, generally, Brookman v. Hamill, 43 N. Y. 554; Lenckhart v. Cooper, 3 Bing. (N. C.) 99. See, also, ante, p. 212.

<sup>302</sup> Barry v. Longmore, 4 Perry & D. 344. And see Sage v. Gittner, 11 Barb. 120.

<sup>303</sup> Schouler, Bailm. (2d Ed.) §§ 96, 103; Lawson, Bailm. § 44.

<sup>304</sup> Roberts v. Stuyvesant Safe-Deposit Co., 123 N. Y. 57, 25 N. E. 294.

<sup>305</sup> Safe-Deposit Co. of Pittsburgh v. Pollock, 85 Pa. St. 391.

receive deposits personally, as in the case of special bank deposits, but, on the contrary, the depositor himself places his property in his safe, and removes it, at his pleasure; the company being ignorant of what, if any, property is in the box or safe. Can it be said, in any true sense, that the company is in possession of the property, or that there has been a delivery? If there is no possession, and no delivery, there is no bailment. In *Gregg v. Hilson*<sup>306</sup> It appeared that defendant had rented from a safe-deposit company a certain closet or safe in its vault, which was locked, and of which he retained the key. The contract by which the safe was rented expressly provided that only in case of refusal to surrender the keys and give up possession to the company at the expiration of the lease on 15 days' notice, was the company authorized to break open the safe. The company contracted to use reasonable diligence that no unauthorized person should be admitted to any rented safe, but beyond that the company was not to be responsible for the contents of any safe rented from it, except by special agreement in writing. A writ of garnishment was served on the safe-deposit company, and the company was ruled to show cause why it should not be compelled to open the safe and file an inventory of the contents. The court said: "I think it very clear that these rented safes cannot be the subject of attachment, under the Act of June 16, 1836, § 35 (Pamph. Laws, 767). They are not 'a debt due to the defendant, or a deposit of money made by him, or goods or chattels pawned, pledged or demised.' The contents of the safe are in actual possession of the renter of the safe. They have not been deposited with or demised to the company. I am asked to make an order upon the company to open the safe and file an inventory of its contents. This, I am of opinion, I have no power to do." In *Peers v. Sampson*,<sup>307</sup> where a room was hired in which to store goods, the key being kept by the hirer, it was held that the owner of the house was not liable for a theft of the goods by his servant, on the ground that the goods had never been delivered to him for safe-keeping.<sup>308</sup>

<sup>306</sup> 8 Phila. 91. See, also, *U. S. v. Graff*, 67 Barb. 304.

<sup>307</sup> 4 Dowl. & R. 636. See, also, *East India Co. v. Pullen*, 1 Strange, 690.

<sup>308</sup> In *Jones v. Morgan*, 90 N. Y. 4, it appeared that plaintiff had rented a room in a storehouse from defendant, who contracted to guard it. The door to the room had two locks, the key of one of which was kept by plain-

These cases are undoubtedly sound in principle. The similarity between safe-deposit companies and bailees lies in the fact that the former, by express contract, assume certain duties, which, in the absence of express contract, are imposed upon the latter by law.

*Agisters.*

An agister is one who takes cattle of another into his own grounds, to be fed, for a consideration to be paid by the owner.<sup>309</sup> The liabilities of agisters do not, in the main, differ from those of other bailees for hire.<sup>310</sup> As has been seen, they have no lien at common law for their charges, though one is commonly given them now by statute,<sup>311</sup> and it was always competent for the parties to stipulate for a lien.<sup>312</sup> Agisters do not insure the safety of the animals intrusted to them, but are merely liable for ordinary negligence.<sup>313</sup> They must keep their grounds properly inclosed.<sup>314</sup> So it has been held negligence for an agister or his servants to leave open his gates, and, if the cattle stray away or are stolen, he will be liable for the loss.<sup>315</sup> It is negligence to turn a colt into a field accessible to a bull, and if the colt is gored the bailee will be responsible, although unaware of the bull's vicious disposition.<sup>316</sup>

tiff. The property was stolen from the room, and, in an action for damages, plaintiff contended that the defendant was a bailee, while the defendant claimed that the relation was that of landlord and tenant. The court said that the relation was one of bailment, though it was not necessary to a decision of the case. The case was likened to that of one who hires a box in a safe-deposit company. The defendant was held liable on his contract, irrespective of whether it created a bailment.

<sup>309</sup> *Bass v. Pierce*, 16 Barb. 595.

<sup>310</sup> *Story*, Bailm. § 443; *Jones*, Bailm. 91, 92.

<sup>311</sup> See ante, p. 222.

<sup>312</sup> *McCoy v. Hock*, 37 Iowa, 436, 437; *Whitlock v. Heard*, 13 Ala. 776; *Goodrich v. Willard*, 7 Gray, 183, 184. And see *Miller v. Marston*, 35 Me. 153.

<sup>313</sup> *Broadwater v. Blot*, Holt, 547; *Smith v. Cook*, 1 Q. B. Div. 79; *Searle v. Laverick*, L. R. 9 Q. B. 122, 130; *McCarthy v. Wolfe*, 40 Mo. 520; *Holty v. Markel*, 44 Ill. 225; *Eastman v. Patterson*, 38 Vt. 146; *Maynard v. Buck*, 100 Mass. 40.

<sup>314</sup> *Cecil v. Preuch*, 4 Mart. (N. S.) 256.

<sup>315</sup> *Story*, Bailm. § 443; *Jones*, Bailm. 92; *Swann v. Brown*, 6 Jones (N. C.) 150.

<sup>316</sup> *Smith v. Cook*, 1 Q. B. Div. 79.

The general duty of an agister is to keep the cattle with the same care that a man of ordinary prudence would use in the performance of the same duty towards his own property. If skill is required for the proper care of the animals, the agister must possess a reasonable degree of skill.

*Factors and Other Bailiffs.*

"These agents are generally held liable only for a reasonable exercise of skill, and for ordinary care and diligence in their vocation.<sup>317</sup> They are consequently not liable for any loss by theft, robbery, fire, or other accident, unless it is connected with their own negligence.<sup>318</sup> Factors have generally a right to sell goods, but they have no right to pawn them, except for an amount not exceeding their lien.<sup>319</sup> They are at liberty to act according to the general usages of trade, and to give credit on sales, wherever that is customary.<sup>320</sup> They are bound, however, in all cases, to follow the lawful instructions of their principals.<sup>321</sup> If they act with reasonable diligence and good faith, they are protected. In cases of unforeseen emergency and necessity, they may even act contrary to the general tenor of the instructions of their principal, if those instructions are manifestly applicable to ordinary circumstances only.<sup>322</sup> But good faith alone is not sufficient. There must be reasonable skill, and a careful obedience to orders, on their part. If there is any loss occasioned by their negligence or mistake or inadvertence, which might fairly have been guarded against by ordinary diligence, they will be held responsible therefor; and a fortiori they will be held responsible where they are guilty of any misfeasance.<sup>323</sup> The rights, duties, and responsibilities of factors, however, more properly belong to a treatise on agency.<sup>324</sup>

<sup>317</sup> Jones, Bailm. 98; Story, Ag. §§ 182-186.

<sup>318</sup> Jones, Bailm. 98; Vere v. Smith, 1 Vent. 121; Coggs v. Bernard, 2 Ld. Raym. 909, 918.

<sup>319</sup> Story, Ag. §§ 78, 113, 225.

<sup>320</sup> Story, Ag. §§ 60, 110, 199, 209.

<sup>321</sup> Streeter v. Horlock, 1 Bing. 34; Story, Ag. §§ 192, 193, 198.

<sup>322</sup> Story, Ag. §§ 85, 118, 141, 193.

<sup>323</sup> Ulmer v. Ulmer, 2 Nott & McC. 489; Story, Ag. §§ 182-185, 188.

<sup>324</sup> Com. Dig. "Merchant," B; Bac. Abr. "Merchant and Merchandise"; Story, Ag. §§ 33, 110-113.

"Although factors and other depositaries for hire are thus bound to ordinary diligence, they are not under any obligation to suggest to their principals wise precautions against inevitable accident.<sup>325</sup> They are therefore not bound to advise insurance against fire; much less are they bound to procure insurance upon the thing bailed, without some authority, express or implied, from their employer.<sup>326</sup> It is quite a different question whether they may not insure the thing bailed, not only on their own account, but also for the benefit of their bailors. It has been held that factors may procure insurance, not only for the benefit of themselves, but also of their principals, even when they are not obliged to do so.<sup>327</sup> But whether naked consignees of goods, or mere depositaries for hire, may so do, is a question which seems not as yet to have been directly adjudicated."<sup>328</sup>

#### TERMINATION OF RELATION.

46. A bailment for hire may be terminated in various ways,—inter alia:

- (a) By accomplishment of its purpose.
- (b) By operation of law.
- (c) By mutual consent.
- (d) By bailee's wrong.
- (e) By loss or destruction of the property bailed.

Bailments for hired use, or for hired services, may be terminated in a variety of ways, as by full performance, or a decisive interruption.<sup>329</sup> The parties may terminate it by mutual consent, but neither party alone can do so. Where a time is fixed for the performance of the bailment, it will continue until that time, or, if no time

<sup>325</sup> Jones, Bailm. 101, 102; Story, Bailm. § 456.

<sup>326</sup> Jones, Bailm. 102.

<sup>327</sup> Story, Ag. § 111; *De Forest v. Fulton Fire Ins. Co.*, 1 Hall (N. Y.) 84, 106, 107, 134, 135; *Lucena v. Craufurd*, 2 Bos. & P. (N. R.) 269, 326.

<sup>328</sup> Story, Bailm. § 456.

<sup>329</sup> Story, Bailm. § 418; Schouler, Bailm. (2d Ed.) § 156. If bailment is for explicitly declared purpose, it terminates whenever that purpose is accomplished. *Cobb v. Wallace*, 5 Cold. (Tenn.) 539.



is fixed, it will continue a reasonable time.<sup>330</sup> The bailment is terminated by the loss or destruction of the thing bailed, and its conversion by the bailee will at least give the bailor a right to terminate the bailment.<sup>331</sup> The bailment is terminated by operation of law whenever the bailee becomes full owner of the thing. Death of either party will not ordinarily terminate the bailment, unless the bailment contract was of such a strictly personal nature that its performance is thereby rendered impossible.<sup>332</sup>

Where the bailment has clearly terminated, as by the expiration of a fixed time,<sup>333</sup> or its conversion or destruction,<sup>334</sup> no demand need be made by the bailor before bringing suit. A demand in such cases would be useless. But, when there is any uncertainty as to whether or not the bailment has terminated, a demand should be made.<sup>335</sup>

#### SAME—REDELIVERY.

**47. At the termination of the hiring the property must be redelivered or delivered over, together with all its increments.**

At the termination of the hiring, the property must be delivered back, or over, according to the terms of the bailment. This redelivery marks the termination of the bailment. The principles governing the duty to redeliver, already discussed in connection with other classes of bailments, are equally applicable here, and will not be repeated.<sup>336</sup>

<sup>330</sup> Bailee must return property whenever called upon, after reasonable time, if time is not fixed by agreement or by nature of object to be accomplished. *Cobb v. Wallace*, 5 Cold. (Tenn.) 539.

<sup>331</sup> Bailment for hire for term is ended by absolute sale by bailee of property bailed before expiration of term, though such sale pass no title; and owner may maintain trover therefor if vendee refuses to make delivery on demand; and rule is same, though bailee had right to purchase the article within term by paying price thereof. *Bailey v. Colby*, 31 N. H. 29. And see *Dunlap v. Gleason*, 16 Mich. 158.

<sup>332</sup> See ante, p. 73.

<sup>333</sup> *Morse v. Crawford*, 17 Vt. 499; *Ross v. Clark*, 27 Mo. 549; *Negus v. Simpson*, 99 Mass. 388; *Benje v. Creagh's Adm'r*, 21 Ala. 151.

<sup>334</sup> *Morse v. Crawford*, 17 Vt. 499.

<sup>335</sup> *Schouler*, *Bailm.* (2d Ed.) § 156.

<sup>336</sup> See ante, pp. 11, 78, 98, 158.

## CHAPTER VI.

## INNKEEPERS.

- 48. Innkeeper Defined.
- 49. Who are Guests.
- 50. Special Agreement.
- 51. Commencement of Relation.
- 52. Rights and Liabilities of Innkeepers.
- 53. Duty to Receive Guests.
- 54. Liability for Guests' Goods.
- 55. For What Property Liable.
- 56. Limited Liability.
- 57. Innkeeper's Lien.
- 58. Waiver.
- 59. Enforcement.
- 60-61. Termination of Relation.
- 62. Innkeepers as Ordinary Bailees.

## INNKEEPER DEFINED.

**48. An innkeeper is one who holds himself out to furnish food and lodging, or lodging alone, to transients. This does not include—**

- (a) Keepers of mere restaurants and eating houses (p. 259).
- (b) Persons giving entertainment only occasionally (p. 260).
- (c) Lodging and boarding house keepers (p. 261).
- (d) Sleeping-car and steamship companies (p. 262).

The definitions of an innkeeper which have been given by the courts and text writers have varied with the times, and the modes of traveling, and the manner of giving public entertainment to travelers.<sup>1</sup> The definition given by Best, J., in *Thompson v. Lacy*<sup>2</sup>

<sup>1</sup> McClain, Synopsis of Ballm. 23. The history of inns, and the derivation of the word "hotel," are discussed at length by Daly, J., in *Cromwell v.*

<sup>2</sup> 3 Barn. & Ald. 283, 287.

is substantially the same as that given in the black letter text. It is as follows: "An inn is a house, the owner of which holds out

Stephens, 2 Daly (N. Y.) 15, 17, as follows: "But this is a word of wide application, and as the meaning which is to be attached to it in this country has been the subject of much discussion upon the argument, it may be well to refer to its origin and past history, as one of the means of determining its exact signification. The word is of French origin, being derived from 'hostel,' and, more remotely, from the Latin word 'hospes,' a word having a double signification, as it was used by the Romans both to denote a stranger who lodges at the house of another, as well as the master of a house who entertains travelers or guests. Among the Romans it was a universal custom for the wealthier classes to extend the hospitality of their house not only to their friends and connections when they came to a city, but to respectable travelers generally. They had inns, but they were kept by slaves, and were places of resort for the lower orders, or for the accommodation of such travelers as were not in a condition to claim the hospitality of the better classes. On either side of the spacious mansions of the wealthy patricians were smaller apartments, known as the *hospitium*, or place for the entertainment of strangers, and the word 'hospes' was a term to designate the owner of such a mansion, as well as the guest whom he received. Andrew's Lex. This custom of the Romans prevailed in the earlier part of the Middle Ages. From the fifth to the ninth century, traveling was difficult and dangerous. There was little security except within castles or walled towns. The principal public roads had been destroyed by centuries of continuous war, and such thoroughfares as existed were infested by roving bands, who lived exclusively by plunder. In such a state of things, there could be little traveling, and consequently the few inns to be found were rather dens to which robbers resorted to carouse and divide their spoils, than places for the entertainment of travelers. *Historie des Hotelleries, Cabarets, etc., par Michel et Fournier, Paris, 1851, p. 181.* The effect of a condition of society like this was to make hospitality not only a social virtue, but a religious duty, and in the monasteries, and in all the great religious establishments, provision was made for the gratuitous entertainment of wayfarers and travelers. Either a separate building, or an apartment within the monastery, was devoted exclusively to this purpose, which was in charge of an officer called the 'hostler,' who received the traveler, and conducted him to this apartment, which was fitted up with beds, where he was allowed to tarry for two days, and to have his meals in the refectory, while, if he journeyed upon horseback, provender was provided by the hostler for his beast in the stables. Fosbroke's *Monachism* (3d Ed.) 238; Davies, 2, 769. In many countries, this apartment, or guest hall, of a monastery retained the original Latin name of '*hospitium*,' but in France the word was blended with 'hospes' and changed into 'hospice'; and it afterwards underwent another change. As civilization advanced, and the nobility of France deserted their

that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and

strong castles for spacious and costly residences in the towns, they erected their mansions upon a scale sufficiently extensive to enable them to discharge this great duty of hospitality,—as is still, or was very recently, the custom among the nobility and wealthier classes in Russia, and in some of the Northern countries of Europe. Borrowing, by analogy, from an existing word, and to distinguish it from the guest house of the monastery, every such great house or mansion was called a 'hostel,' and, by the mutation and attrition to which these words are subject in use, the 's' was gradually dropped from the word, and it became 'hotel.' As traveling and intercourse increased, the duty upon the nobility of entertaining respectable strangers became too onerous a burden, and establishments in which this class of persons could be entertained by paying for their accommodation sprung up in the cities, towns, and upon the leading public roads, which, to distinguish them from the great mansions or hotels of the wealthy, and at the same time to denote that they were superior to the 'auberge' or 'cabaret,' were called 'hotelleries,' a name which has been in use in France for several centuries, and is still in use to some extent as a common term for inns of the better class, while the word 'hotel,' in France, has long ceased to be confined to its original signification, and has become a word of the most extensive meaning. It is the term for the mansion of a prince, nobleman, minister of state, or of a person of distinction or of celerity. It is applied to a hospital, as Hotel Dieu; or to a town hall, as Hotel de Ville; to the residence of a judge, to certain public offices, and to any house in which furnished apartments are let by the day, week, or month. Roquefort, *Etymologique Francais*, Paris, 1829; *Dictionnaire de l'Academie Francais*, 1798, et *Complement au Dictionnaire*; *Bescherelle, Dictionnaire Francais*. The word, though so long in use in France, is of comparatively recent introduction into the English language. The Saxon word 'inn' was employed to denote a house where strangers or guests were entertained, down to the time of the Norman invasion; and, under the Norman rule, it was, in the popular tongue, the word for the town houses in which great men resided when they were in attendance on court, several of which became afterwards legal colleges, under the well-known title of 'inns of court.' Pearce, 50. In all legal proceedings, however, and wherever the Norman French was spoken, the word 'hostel' was the term for all such establishments. The places where entertainment could be procured for a compensation, to distinguish them from the inns or great houses where it was furnished gratuitously, were called, in English, 'common inns'; while in Norman French, by a change analogous to that which had occurred in France, they were called first 'hostelleries,' and afterwards 'hostries.' Y. B. 42 Edw. III. p. 11; Id., 22 Hen. VI. 38; Statutes 5 Edw. III. c. 11; Fitzh. Abr. pp. 2, 28; Brooke, Abr. pp. 4, 15; Dyer, 15Sa, note; Lee & Grissel's Case, Godb. 347,

who come in a situation in which they are fit to be received." \* The names "inn," "hotel," and "tavern" are used without any distinction

Kelh. Dict. Law, Fr. Dict. 1701. To 'host' was to put up at an inn; and 'hostler,' before referred to as the title of the officer in the monastery who was charged with the entertainment of guests, was the Norman word for innkeeper, and was in use until about the time of Elizabeth, when, the keeping of horses at livery becoming a distinct occupation, it was the term for the keeper of a livery stable (Case of an Hostler, Yel. 67; Cooke, Ent. 347; and afterwards of the groom who has charge of the stables of an inn (Calyc's Case, 8 Coke, 32a; Bailey, Dict.). It appears from a note of Malone, referred to in Todd's edition of Johnson's Dictionary, that the word 'hotel' came into use in England by the general introduction in London, after 1770, of the kind of establishment that was then common in Paris, called an 'hotel garni,' a large house in which furnished apartments were let by the day, week, or month. In Barclay's Dictionary (1772), in the first edition of Walker (1791), and in Sheridan's Dictionary (1795), 'hotel' is given as the proper pronunciation of 'hostel,' an inn; and in the dictionaries of Jones (1798), and of Perry (1805), it is incorporated as an English word, and is defined in the latter to be 'an inn, having elegant lodgings and accommodations for gentlemen and genteel families.' Todd (1811) defines it to be 'a lodging house for the accommodation of occasional lodgers, who are supplied with apartments hired by the night or week.' The definition given by Knowles (1835) is simply 'a lodging house'; by Smart (1836), 'a lodging house or inn'; Bolo (1845), 'an inn or a lodging house'; Boag, (1848), 'an inn'; and by Dr. Latham, in his edition of Johnson's Dictionary, 'an inn of a superior kind.' The word was introduced into this country about 1797. Before that time, houses for the entertainment of travelers in this city were at first called 'inns,' and afterwards 'taverns' and 'coffee houses.' In 1794 an association, organized upon the principle of a tontine, erected in Wall street what was then a very superior house for the accommodation of travelers, called the 'Tontine Coffeehouse,' the success of which led to the formation of another company for the erection of one upon a still more extensive scale in Broadway. This structure, which was called the 'Tontine Tavern,' was built about 1796, upon the site of what had been a famous tavern or coffee house in colonial times; and from the extensive accommodation it afforded, and the superior character of its appointments, it was then, and for many

\* For other cases defining an innkeeper, see *Wintermute v. Clark*, 5 Sandf. (N. Y.) 242, 247; *People v. Jones*, 54 Barb. (N. Y.) 311; *Walling v. Potter* 35 Conn. 183; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72, 75; *Mateer v. Brown*, 1 Cal. 221, 227; *Dansey v. Richardson*, 3 El. & Bl. 144; *Doe v. Lanning*, 4 Camp. 77; *Com. v. Weatherbee*, 101 Mass. 214; *Rafferty v. New Brunswick Fire Ins. Co.*, 18 N. J. Law, 480; *Gray v. Com.*, 9 Dana (Ky.) 300.



in legal meaning in this country,<sup>4</sup> though such distinctions are made in England.<sup>5</sup> The definition of an inn given by Justice Bayley, in the above case, as "a house where a traveler is furnished with everything which he has occasion for while on his way," is comprehensive enough to include every description of an inn; but a house that does not fill the full measure of this definition may be an inn. It is not regarded as essential to an inn that wine or spirituous or malt liquors should be provided for the guests.<sup>6</sup> At an inn of the greatest completeness, entertainment is furnished for the traveler's horse, as well as for the traveler, but it has long since

years afterwards, the most celebrated establishment of the kind in the country. There was at that period a rage for everything French: The city was filled with refugees from France and from the French West India possessions, whose residence among us produced a great change in our social habits, amusements, and tastes (Watson's Annals, 209), while a fierce party strife prevailed between those who advocated the principles of the French Revolution and those who condemned them. The French national airs were sung in the streets; men mounted the tricolor cockade; and the proprietors of the new tavern, falling in with the popular current, gave a French name to their establishment, by changing it from the 'Tontine Tavern' to the 'City Hotel.' The new word was afterwards adopted by the proprietors of other houses for the entertainment of travelers in this and neighboring cities, and, becoming general, found its way into American dictionaries. Allison, one of the earliest of American lexicographers (1813), defines it to be 'an inn of a high grade; a respectable tavern.' Webster calls it 'a house for entertaining strangers or travelers,' and says that 'it was formerly a house for genteel strangers or lodgers,' but that 'the name is now [1840] given to any inn.' Worcester's definition (1846) is, 'A superior lodging house with the accommodations of an inn; a public house; a genteel inn; an inn;' and in the last edition of Webster (1864) there is given an addition to the previous general definition, 'An inn; a public house; especially one of some style or pretensions.' It is to be deduced, from the origin and history of the word, and the exposition that has been given of it by English and American lexicographers, that an hotel, in this country, is what in France was known as an 'hotellerie,' and in England as a 'common inn,' of that superior class usually found in cities and large towns."

<sup>4</sup> *People v. Jones*, 54 Barb. 311; *St. Louis v. Siegist*, 46 Mo. 593; *Lewis v. Hitchcock*, 10 Fed. 4; *Kopper v. Willis*, 9 Daly (N. Y.) 460, 462.

<sup>5</sup> *Jones v. Osborn*, 2 Chit. 484, 486; *Wandell*, Inns, 15.

<sup>6</sup> *Pinkerton v. Woodward*, 33 Cal. 557, 596; *St. Louis v. Siegrist*, 46 Mo. 593.

been held that this was not essential to give character to the house as an inn.<sup>7</sup>

*Lodging, Only, Furnished.*

It is not necessary, to constitute one an innkeeper, and subject to the liabilities thereof, that he furnish both food and lodging. The proprietors of the so-called "European Hotels" are innkeepers, when they hold themselves out to furnish lodging to all who may apply, though meals are furnished only a la carte, or not at all. But lodging must be furnished to transients applying therefor, or it is not an inn. Thus, where a building is divided into suites or flats, each suite rented to families for housekeeping purposes; heat, hot and cold water, and janitor's services being furnished to each suite by the proprietor, but where no board, lodging, or accommodation for transient patrons is provided, the house is not an inn.

*Restaurants and Eating Houses.*

On the other hand, the furnishing of food alone, without lodging, does not make one an innkeeper. A mere restaurant or eating house for meals cannot be considered an inn, nor can the liabilities attaching to innkeepers be extended to the proprietors of such establishments. They are wanting in some of the requisites necessary to constitute them inns, as no lodging places are provided for travelers; and, although the proprietor may carry on, in another part of his premises, the business of an innkeeper, it does not follow that the liability for that part of his premises is to be extended to the whole.<sup>10</sup>

<sup>7</sup> Thompson v. Lacy, 3 Barn. & Ald. 283; 1 Smith, Lead. Cas. notes to Coggs v. Bernard) 402; Kisten v. Hildebrand, 9 B. Mon. 72, 74; Pinkerton v. Woodward, 33 Cal. 557, 596.

<sup>8</sup> Krohn v. Sweeney, 2 Daly, 200; Pinkerton v. Woodward, 33 Cal. 557; Willard v. Reinhardt, 2 E. D. Smith (N. Y.) 148; Wintermute v. Clark, 5 Sand. (N. Y.) 243; Bernstein v. Sweeny, 33 N. Y. Super. Ct. 271; Taylor v. Monnot, 4 Duer (N. Y.) 116; Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72. One who holds himself out to the world as an innkeeper may be regarded as such, though the only eating department of his establishment is a restaurant in the basement, connected with the house by a stairway, and conducted by the innkeeper and two other persons jointly, who share the profits. Pinkerton v. Woodward, 33 Cal. 557.

<sup>9</sup> Davis v. Gay, 141 Mass. 531, 6 N. E. 549.

<sup>10</sup> Carpenter v. Taylor, 1 Hilt. (N. Y.) 193; Queen v. Rymer, 2 Q. B. Div. 136; The Civil Rights Bill, 1 Hughes (U. S.) 541, 543, Fed. Cas. No. 2,774; Bonner

*Occasional Entertainment.*

There is no reason why one may not be an innkeeper at certain seasons of the year and not at other times. This is undoubtedly the relation in which the proprietors of hotels at our summer resorts stand to those whom they entertain, though they keep their houses open during a few months of the year only. They are innkeepers, however, only when the facts are such as to bring them within our definition of an innkeeper, as given above. In a number of cases the facts have been such that the proprietors of similar places have been held not to be innkeepers. Thus, in *Parkhouse v. Forster*,<sup>11</sup> a special verdict found the following facts: "The plaintiff kept a house at Epsom (a watering place), and let lodgings to such persons as might resort to that place to drink the waters, and on account of the salubrity of the air; and that he dressed meat for his lodgers at 4 pence per joint, and sold them beer at 2 pence per mug, and also found them stable room, hay, etc., for horses, at such and such rates." According to this description of his business, the question was, was he an "innkeeper," in the legal sense of the word? and the court determined that he was not. Holt, C. J., said, "The case is so plain that there is no occasion to give reasons," and accordingly gave none.<sup>12</sup>

So, in *Lyon v. Smith*,<sup>13</sup> the court said: "To render a person liable as a common innkeeper it is not sufficient to show that he occasionally entertains travelers. Most of the farmers in a new country do this, without supposing themselves answerable for the horses or other property of their guests which may be stolen or otherwise lost without any fault of their own. Nor is such the rule in older countries, where it would operate with far less injustice, and be

*v. Welborn*, 7 Ga. 296; *Willard v. Reinhardt*, 2 E. D. Smith (N. Y.) 148; *Walling v. Potter*, 25 Conn. 183; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 73; *Doe v. Laming*, 4 Camp. 77; *In re Kelly v. Excise Com'rs*, 54 How. Prac. 332.

<sup>11</sup> 5 Mod. 427.

<sup>12</sup> The same has been held, on similar facts, in *Parker v. Flint*, 12 Mod. 254, and *Bonner v. Welborn*, 7 Ga. 296. See, also, *Parkhurst v. Foster*, 1 Ld. Raym. 479, Carth. 417; *Bac. Abr. tit. "Inns & Innkeepers," B*; *Farnworth v. Packwood*, Holt, N. P. 209, 1 Starkie, 249; *Mason v. Grafton*, Hob. 245b; *Dr. & Stud.* 137b; *Calye's Case*, 8 Coke, 32a; *Overseers of Poor of Crown Point v. Warner*, 3 Hill (N. Y.) 150; *State v. Chamblyss*, 1 Cheves (S. C.) 220.

<sup>13</sup> *Morris* (Iowa) 244, 246.

less opposed to good policy, than with us. To be subjected to the same responsibilities attaching to innkeepers, a person must make tavern keeping, to some extent, a regular business,—a means of livelihood; he should hold himself out to the world as an innkeeper. It is not necessary that he should have a sign or a license, provided that he has in any other manner authorized the general understanding that his was a public house, where strangers had a right to require accommodation. The person who occasionally entertains others for a reasonable compensation is no more subject to the extraordinary responsibility of an innkeeper than is he liable as a common carrier who, in certain special cases, carries the property of others from one place to another for hire.”<sup>14</sup>

*Lodging and Boarding Houses.*

Keepers of lodging and boarding houses are not innkeepers, nor subject to their liabilities.<sup>15</sup> The proprietor of such a house does not hold himself out to the public as prepared to provide accommodations for all who may apply, and he is not bound to receive any person unless he chooses to do so,<sup>16</sup> though, as will be seen,<sup>17</sup> an innkeeper must. So, in a boarding house, the guest is under an express contract, at a certain rate, for a certain period of time; but in an inn there is no express engagement. The guest, being on his way, is entertained from day to day, according to his business, upon an implied contract.<sup>18</sup> So, the keeper of a common inn may have inmates of his house, for a reward, to whom he may not be under the strict liability of an innkeeper.<sup>19</sup> So may the keeper of a

<sup>14</sup> And see *Cady v. McDowell*, 1 Lans. (N. Y.) 484; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; *Howth v. Franklin*, 20 Tex. 798; *State v. Mathews*, 2 Dev. & B. (N. C.) 424.

<sup>15</sup> They are liable for the goods of their lodgers or boarders only as ordinary bailees for hire. *Smith v. Read*, 52 How. Prac. 14; *Vance v. Throckmorton*, 5 Bush (Ky.) 41; *Manning v. Wells*, 9 Humph. (Tenn.) 746; *Johnson v. Reynolds*, 3 Kan. 257; *Wiser v. Chesley*, 53 Mo. 547; *Dansey v. Richardson*, 3 El. & Bl. 144; *Holder v. Soulby*, 8 C. B. (N. S.) 254.

<sup>16</sup> *Cady v. McDowell*, 1 Lans. (N. Y.) 484, 486; *Cromwell v. Stephens*, 2 Daly (N. Y.) 15; *Dansey v. Richardson*, 3 El. & Bl. 144, 159; *The Queen v. Rymer*, 2 Q. B. Div. 136.

<sup>17</sup> Post, p. 274.

<sup>18</sup> *Willard v. Reinhardt*, 2 E. D. Smith, 148.

<sup>19</sup> *Hall v. Pike*, 100 Mass. 495; *Vance v. Throckmorton*, 5 Bush (Ky.) 41; *Pollock v. Landis*, 36 Iowa, 651; *Cross v. Wilkins*, 43 N. H. 332; *Johnson v.*

boarding house occasionally entertain transient persons without acquiring the character, or being under the responsibilities, of an innkeeper. And, certainly, a man professing to be the keeper of a boarding house or a licensed coffee house is not, though he also entertain travelers, liable to his boarders as an innkeeper is liable to his traveling guests.<sup>20</sup>

An establishment may have a double character, being both a boarding house and an inn. In respect to transient persons, who, without any stipulated contract, remain from day to day, it will be an inn; while, as to those residing there under special contracts, it will be a boarding house.<sup>21</sup>

*Sleeping-Car Companies and Steamship Companies.*

Sleeping-car companies are held not to occupy the relation of innkeepers to those who hire berths of them.<sup>22</sup> The grounds for so holding are, as stated in one case, that the sleeping-car company does not, like an innkeeper, undertake to accommodate the traveling public, indiscriminately, with lodging and entertainment. It only undertakes to accomodate a certain class,—those who have already paid their fare, and are provided with a first-class ticket, entitling them to ride to a particular place.<sup>23</sup> It does not undertake to furnish victuals and lodging, but lodging alone, as we understand. There is usually a dining car attached to the train, not

Reynolds, 3 Kan. 257; *Wiser v. Chesley*, 53 Mo. 547; *Taylor v. Downey* (Mich.) 62 N. W. 716. And see post, p. 299.

<sup>20</sup> *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72.

<sup>21</sup> *Seward v. Seymour*, Anthon, Law Stud. 51; *Cromwell v. Stephens*, 2 Daly (N. Y.) 15.

<sup>22</sup> *Pullman Palace-Car Co. v. Smith*, 73 Ill. 360; *Lewis v. New York Sleeping-Car Co.*, 143 Mass. 267, 273; *Woodruff Sleeping & Parlor Coach Co. v. Diehl*, 84 Ind. 474, 481; *Blum v. Southern Pullman Palace-Car Co.*, 1 Flip. 500, Fed. Cas. No. 1,574; *Dargan v. Pullman Palace-Car Co.*, 2 Willson, Civ. Cas. Ct. App. 607; *Pullman Palace-Car Co. v. Gaylord*, 6 Ky. Law Rep. 279; *Welch v. Pullman Palace-Car Co.*, 16 Abb. Prac. (N. S.) 352; *Pullman Car Co. v. Gardner*, 3 Penny. (Pa.) 78; *Tracy v. Pullman Car Co.*, 67 How. Prac. 154. But see, contra, *Pullman Palace-Car Co. v. Lowe*, 28 Neb. 239, 44 N. W. 226.

<sup>23</sup> *Welch v. Pullman Palace-Car Co.*, 16 Abb. Prac. (N. S.) 352, 357. But that they are bound to receive any one who applies for a berth, see dictum in *Nevlin v. Pullman Palace-Car Co.*, 106 Ill. 222.



owned by the same company, nor run by it. The sleeping-car company furnishes no accommodation whatever, save the use of the berth and bed, and a place and conveniences for toilet purposes. An innkeeper, as we shall see, is obliged to receive and care for all the goods and property of the traveler which he may choose to take with him upon the journey. A sleeping-car company does not receive pay for, nor undertake to care for, any property or goods whatever, and notoriously refuses to do so. The custody of the goods of the traveler is not, as in the case of the innkeeper, accessory to the principal contract to feed, lodge, and accommodate the guest for a suitable reward, because no such contract is made. So, too, the same necessity does not exist here as in the case of a common inn. At the time when this custom of an innkeeper's liability had its origin, wherever the end of the day's journey of the wayfaring man brought him, there he was obliged to stop for the night, and intrust his goods and baggage into the custody of the innkeeper. But the traveler is not compelled to accept the additional comfort of a sleeping car; he may remain in the ordinary car.<sup>24</sup>

But all the cases seem to agree that the company's duty is to exercise at least ordinary care for the security of passengers' valuables. Of course, this care must be in proportion to the danger reasonably to be apprehended. Such danger is greater at night, while the passenger is asleep, than in the daytime, when he is awake and can care for himself. This point is well stated in *Blum v. Southern Pullman Palace-Car Co.*:<sup>25</sup> "The scope of the liability of companies of this kind, so far as I know, has never been judicially determined. It is undoubtedly the law that, where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss,—as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory, it is insisted by defendant [the sleeping-car company] that it cannot be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot, for a moment, accede to this proposition. It is scarcely neo-

<sup>24</sup> *Pullman Palace-Car Co. v. Smith*, 73 Ill. 360.

<sup>25</sup> 1 Flip. 500, Fed. Cas. No. 1,574.

essary to say that a person asleep cannot retain manual possession or control of anything. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care upon his own part is impossible. There is all the delivery which the circumstances of the case admit. I think it should keep a watch during the night, see to it that no unauthorized persons intrude themselves into the car, and take reasonable care to prevent thefts by the occupants."<sup>26</sup>

In the same way, it has been held that a steamship company does not assume the responsibilities of an innkeeper towards the property of a passenger kept by him in his stateroom.<sup>27</sup>

*Holding Out as Innkeeper.*

Although one might not be an innkeeper within the rules shown by the foregoing paragraphs, yet he may assume an innkeeper's liability by holding himself out to the public to be such.<sup>28</sup> In *Pinkerton v. Woodward*<sup>29</sup> it was said: "The rules regulating the respective rights, duties, and responsibilities of innkeeper and guest have their origin in considerations of public policy, and were designed mainly for the protection and security of travelers and their property. They would afford the traveler but poor security if, before venturing to intrust his property to one who, by his agents, cards, bills, advertisements, sign, and by all the means by which publicity and notoriety can be given to his business, represents himself as an innkeeper, he is required to inquire of the employes as to their interest in the establishment, or take notice of the agencies or means by which the several departments are conducted. The same considerations of public policy that dictated those rules demand that the innkeeper should be held to the responsibilities which, by his representations, he induced his guest to believe that he would assume."

An innkeeper cannot set up the fact that he is not licensed as a defense to his liability. A license does not change the character

<sup>26</sup> And see *Woodruff, etc., Coach Co. v. Diehl*, 84 Ind. 474, 483.

<sup>27</sup> *Clark v. Burns*, 118 Mass. 275; *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302; and see post, p. 400.

<sup>28</sup> *Pinkerton v. Woodward*, 33 Cal. 557; *Howth v. Franklin*, 20 Tex. 798; *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179.

<sup>29</sup> 33 Cal. 557.

of the business of those who entertain travelers. The possession of it does not make nor the want of it prevent a person from being an innkeeper at common law; it is his business alone that fixes the status of a party in this respect. A license saves an innkeeper from the penalty of being an innkeeper without license, but the want of it does not save him from his liability to his guests. It would be a perversion of justice, and a fraud upon the law, if he could avail himself of his own criminality to defeat their lawful claims against him. Besides, it is not their duty to inquire whether one who entertains travelers is duly licensed, if, indeed, they could ascertain this upon inquiry.<sup>30</sup>

#### WHO ARE GUESTS.

**49. A transient who patronizes an inn as such, and receives accommodations with the consent of the innkeeper, is a guest.**

The determination of the question of who are guests<sup>31</sup> is as important as to decide who are innkeepers; for, as the exceptional liabilities which will be subsequently discussed are imposed only

<sup>30</sup> *Norcross v. Norcross*, 53 Me. 163.

<sup>31</sup> As we proceed with the discussion of the subject, the inadequacy of the following definitions of a guest will become apparent: Every one who is received into an inn and has entertainment there, for which the innkeeper has compensation by way of remuneration or reward for his services, is a guest. *Comegys, C. J.*, in *Russell v. Fagan* (Del.) 8 Atl. 258, 260. A guest is one who comes without any bargain for time, remains without one, and may go when he pleases. 2 Pars. Cont. 151. A guest is one who patronizes an inn as such. *Walling v. Potter*, 35 Conn. 183. Any one away from home, receiving accommodations at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such. *Wintermute v. Clark*, 5 Sandf. (N. Y.) 242, 247, adopted in *Pullman Palace-Car Co. v. Lowe*, 28 Neb. 239, 44 N. W. 226. Guests are those who are bona fide (really) traveling, and make the use of an inn, and not mere neighbors and friends who visit the house occasionally. *Tidswell, Innkeepers' Legal Guide*, 1. A guest is "a stranger who comes from a distance and takes his lodgings at a place." *Webst. Dict.* See, also, a valuable article in 14 Cent. Law J. 206; and *Hall v. Pike*, 100 Mass. 495; *Norcross v. Norcross*, 53 Me. 163; *Pinkerton v. Woodward*, 33 Cal. 557; *Hancock v. Rand*, 17 Hun, 279; *Phillips v. Henson*, 30 Moak, Eng. R. 19; *Thomp-*

on those who are strictly innkeepers,<sup>32</sup> so these liabilities exist in favor of guests alone, and not in favor of boarders, or persons resorting to the inn for other purposes than that of becoming a guest.\* Thus, a man who goes to an hotel with a prostitute, for the purpose of having sexual intercourse, is not a guest, though he registers and is assigned a room.<sup>33</sup> So, a man who engages a room at an hotel, and leaves a package of money with the clerk, but does not occupy the room at that time, is not a guest, when his primary object is to deposit his money in a safe place.<sup>34</sup>

son v. Ward, L. R. 6 C. P. 327; Bradley v. Baylis, 8 Q. B. Div. 195; Ness v. Stephenson, 9 Q. B. Div. 245; Hickman v. Thomas, 16 Ala. 666; Ullman v. State, 1 Tex. App. 220; Dickerson v. Rogers, 4 Humph. (Tenn.) 179.

<sup>32</sup> See ante, p. 254.

\* See Mowers v. Fethers, 61 N. Y. 34; Grinnell v. Cook, 3 Hill (N. Y.) 485; Ingalsbee v. Wood, 36 Barb. (N. Y.) 452, 455; Hulett v. Swift, 33 N. Y. 571.

<sup>33</sup> Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825. In this case Cole, C. J., said that "while the definition of a guest has been somewhat extended beyond its original meaning, it does not include everyone who goes to an inn for convenience to accomplish some purpose. If a man and woman go together to, or meet by concert at, an inn or hotel in the town or city where they reside, and take a room for no other purpose than to have illicit intercourse, can it be that the law protects them as guests? Is the extraordinary rule of liability which was originally adopted from considerations of public policy to protect travelers and wayfarers, not merely from the negligence, but the dishonesty, of innkeepers and their servants, to be extended to such persons? \* \* \* Then, for a like reason, it would protect a thief who takes a room at an inn, and improves the opportunity thus given to enter the rooms and steal the goods of guests and boarders." Cf. Mackbee v. Griffith, 2 Cranch, C. C. 336. Fed. Cas. No. 8,660; Lloyd v. Johnson, 1 Bos. & P. 340.

<sup>34</sup> W., the keeper of a gambling house, closed his night's business at 2 o'clock a. m., having a sum of money upon his person, and, not being ready to retire for the night, and not wishing to carry his money upon his person at that time of the night, visited an inn, for the purpose of depositing his money for safe-keeping; found the inn in charge of a night clerk; inquired if he could have lodging for the night; was told that he could; stated that he did not desire to go to his room at that time, but wished to leave some money with the clerk, and would return in about half an hour. The clerk told him he would reserve a good room for him. He did not register his name. It was not upon any book of the inn. No room was assigned him. He left his package of money with the clerk, received a check for it, and departed. He returned in about three hours to have a room assigned him and retire for the balance of the morning. The clerk had absconded with

*Who are Transients.*

The most important idea, probably, in determining who are guests, is that they must be transients.<sup>35</sup> Other terms are also used by the courts, such as "traveler," or "wayfarer," but the meaning is the same. One who has his permanent abode in the place is not a guest.<sup>36</sup> An engineer or conductor, who follows his employment, and runs his regular trips, stopping over at each end of his route either at his own house or at an hotel, is neither a traveler, a wayfaring man, nor a transient person. He is a citizen of the community at both ends of his route. The fact that he works upon a train which runs 30 miles an hour does not make him a traveler, any more than if he worked in the company's shops. If he goes to an hotel, and rents a room by the month, he is no more a guest, in the legal sense which fixes the liabilities of innkeepers, than if he were a mechanic in the shops, or a permanent citizen of the place.<sup>37</sup> But officers of the army and navy, and soldiers and sailors, who have no permanent residence which they can call home, may well be regarded as travelers or wayfarers when stopping at public inns or hotels, and to make them chargeable as mere boarders it should be shown satisfactorily that an explicit contract had been made which deprived them of the privileges and rights which their vocation conferred upon them as passengers or travelers.<sup>38</sup>

the money. Held, W. was not a guest of the Inn at the time he deposited his money with the clerk, and the innkeeper was not liable for its loss. *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32, 4 N. E. 398.

<sup>35</sup> *Jalie v. Cardinal*, 35 Wis. 118; *Curtis v. Murphy*, 63 Wis. 4; *Manning v. Wells*, 9 Humph. (Tenn.) 746; *Neal v. Wilcox*, 4 Jones (N. C.) 146; *Horner v. Harvey*, 3 N. M. 197, 5 Pac. 329; *Russell v. Fagan* (Del.) 8 Atl. 258; *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; *Beale v. Posey*, 72 Ala. 323; *Burgess v. Clements*, 4 Maule & S. 306.

<sup>36</sup> *Ewart v. Stark*, 8 Rich. Law (S. C.) 423. The fact that an hotel has a rule to charge a guest a less rate per diem by the week than by the day, and that, if a guest had been there longer than a week, he got the benefit of the rule, does not show that one who had been at the hotel more than a week was a "boarder," rather than a "guest." It not being shown that he had any notice of the rule, or any knowledge of the charges, or that any arrangement for a permanent stay had been made. *Magee v. Pacific Imp. Co.*, 93 Cal. 678, 33 Pac. 772.

<sup>37</sup> *Horner v. Harvey*, 3 N. M. 197, 5 Pac. 329.

<sup>38</sup> *Hancock v. Rand*, 94 N. Y. 1.



A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at an inn, his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, he is subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, any one away from home, receiving accommodations at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such.<sup>39</sup>

*The Entertainment Received.*

A neighbor or friend who comes to an inn on the invitation of the innkeeper is not deemed a guest.<sup>40</sup> It is not the fact that a person does or does not take lodgings that makes him a guest. It is the motive with which he visits the place,—whether to use it, even for the briefest period or the most trifling purpose, as a public house or not.<sup>41</sup>

One need not be entertained at an inn any definite length of time to make him a guest.<sup>42</sup> Thus, it has been held that even the purchasing of liquor was sufficient, under some circumstances, to make one the guest of the innkeeper; for it is not the amount of refreshments, but the character under which the purchaser buys them, which determines the relation of the parties.<sup>43</sup> Of course, a man could not be said to be a traveler who goes to a place merely

<sup>39</sup> *Curtis v. Murphy*, 63 Wis. 4, 22 N. W. 825; *Walling v. Potter*, 35 Conn. 183. The cases are numerous where persons obviously living near by were held guests, thus: A driver of cattle along the road, in *Hilton v. Adams*, 71 Me. 19. One who came with a horse and wagon to attend the trial of a case brought against him by the innkeeper, in *Read v. Amidon*, 41 Vt. 15. One who came to market, in *Bennet v. Mellor*, 5 Term R. 273. So, it does not appear that the party was a traveler in *Farnworth v. Packwood*, 1 Starkie, 249. See, also, *McDonald v. Edgerton*, 5 Barb. 560; *Parker v. Flint*, 12 Mod. 254 (case 455); *Hancock v. Rand*, 94 N. Y. 1.

<sup>40</sup> *Bac. Abr.* "Inns and Innkeepers," 5; *Comyn, Dig.* "Action on Case for Negligence," B, 2.

<sup>41</sup> *Read v. Amidon*, 41 Vt. 15. But see *Lynar v. Mossop*, 36 Q. B. U. C. 230.

<sup>42</sup> *Kopper v. Willis*, 9 Daly (N. Y.) 460, 465.

<sup>43</sup> *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560, 562; *Fitch v. Casler*, 17 Hun (N. Y.) 126, 127.

for the purpose of taking refreshment.<sup>44</sup> But if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he becomes a guest.<sup>45</sup> Thus, in *Bennet v. Mellor*,<sup>46</sup> the plaintiff's servant took the goods in question to market at Manchester, and, not being able to dispose of them, he brought them to the defendant's inn, and asked the defendant's wife if he could leave them there until the next market day. She told him that she could not tell, for they were very full of parcels. The servant then sat down in the inn, put the goods on the floor behind him, and had some liquor. After sitting awhile, he arose, and found that the goods were missing. On this state of facts, the jury gave a verdict for the plaintiff; and the court sustained the verdict, on the ground that the plaintiff's servant had become and was the guest of the defendant at the time when the goods were stolen.

But the entertainment must be given by the innkeeper in that capacity. So, where a man attends a ball at an hotel, at the invitation of the proprietor, and has supper and stabling for his horse, and buys liquor at the bar, he is not a guest, and the innkeeper is not liable as such for injuries to the horse.<sup>47</sup>

#### *Consent of Innkeeper.*

No person can make himself a guest without the innkeeper's consent.<sup>48</sup> Of course, that consent may be given by an agent or a servant intrusted with the duty of receiving and rejecting travelers. There need be no formal bargain, for the acceptance of a person as a guest will be implied, where he calls for refreshment which is furnished to him by a servant who has the discretion either to give or

<sup>44</sup> *Com. v. Moore*, 145 Mass. 244; *Com. v. Hagan*, 140 Mass. 289, 3 N. E. 207; *Reg. v. Rymer*, 2 Q. B. Div. 36; *Rex v. Llewellyn*, 12 Mod. 445; *Warbrooke v. Griffin*, 2 Brown & G. 254.

<sup>45</sup> *Atkinson v. Sellers*, 5 C. B. (N. S.) 442, 443. And see dictum in *Curtis v. Murphy*, 63 Wis. 4, 22 N. W. 825.

<sup>46</sup> 5 Term R. 273. For comments on this case, see *Strauss v. County Hotel & Wine Co.*, 12 Q. B. Div. 27; *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560; *Kopper v. Willis*, 9 Daly (N. Y.) 460, 465; *McDaniels v. Robinson*, 26 Vt. 316, 332.

<sup>47</sup> *Fitch v. Casler*, 17 Hun (N. Y.) 126. To the same effect is *Carter v. Hobbs*, 12 Mich. 52.

<sup>48</sup> *Gastenhofer v. Clair*, 10 Daly (N. Y.) 265, 266; *Strauss v. County Hotel & Wine Co.*, 12 Q. B. Div. 27.

to withhold it. But a man cannot make himself a guest by slipping into the dining room of an hotel and ordering a dinner of a waiter who has no discretion whatever, and who brings what is ordered, under the belief that the person who gives the order is in the dining room by permission of the innkeeper. Permission to enter the dining room cannot be implied. A man can no more enter the dining room without permission than he can enter a sleeping room and go to sleep without permission. He must first give the innkeeper an opportunity to receive or to reject him. If he be accepted as a guest, he is, of course, entitled to the usual privileges of a guest. One who goes to an inn to call upon a guest does not by so doing become a guest himself.<sup>49</sup>

*Leaving Horse at Inn.*

Although there is a good deal of confusion in the cases, it is believed that merely leaving a horse at the stables of an inn is not sufficient to make the one leaving the horse a guest. The rules deducible from the cases seem to be that when one who is on a journey stops at an inn to obtain food, etc., for his horse, though he receives no entertainment himself, he becomes a guest.<sup>50</sup> So, if one who intends to become a guest of an inn should send his horse there in advance, and the innkeeper should receive him on that understanding, the owner of the horse would be a guest from that time.<sup>51</sup> But anything less would, it seems, be insufficient to establish the relation of landlord and guest.<sup>52</sup> Thus, a traveler who sends his horse to an inn to be cared for, but does not stop at the inn himself, or have any intention of so doing, does not become a guest.<sup>53</sup>

<sup>49</sup> Gastenhofer v. Clair, 10 Daly (N. Y.) 265, 266. Cf. Kopper v. Willis, 9 Daly (N. Y.) 460; Bennet v. Mellor, 5 Term R. 273.

<sup>50</sup> Mason v. Thompson, 9 Pick. (Mass.) 280; McDaniels v. Robinson, 26 Vt. 316; Thickstun v. Howard, 8 Blackf. (Ind.) 535; Russell v. Fagan (Del.) 8 Atl. 258.

<sup>51</sup> Grinnell v. Cook, 3 Hill (N. Y.) 485. That one need not be present in person at an inn to be a guest, but may be such by having property there in charge of a servant or agent, see Coykendall v. Eaton, 55 Barb. (N. Y.) 188.

<sup>52</sup> Grinnell v. Cook, 3 Hill (N. Y.) 485; Ingallsbee v. Wood, 33 N. Y. 577, 579; Healey v. Gray, 68 Me. 489; Thickstun v. Howard, 8 Blackf. (Ind.) 535; McDaniels v. Robinson, 26 Vt. 316.

<sup>53</sup> Healey v. Gray, 68 Me. 489; Grinnell v. Cook, 3 Hill (N. Y.) 485; Ingallsbee v. Wood, 33 N. Y. 577.

Much less would one not a traveler acquire the rights of a guest by using the stables of an inn as a mere livery.<sup>54</sup> There are some cases which hold that the mere leaving of a horse at an inn makes one a guest,<sup>55</sup> but it is believed that the weight of authority and the tendency of modern decisions support the rules as stated above, and the other cases do not seem to be justifiable on principle.

#### SAME—SPECIAL AGREEMENT.

**50. A guest does not lose that character by making an arrangement for a definite time, or at special rates, provided he remains a transient.**

Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day, or per week, deprives him of his character as a traveler and a guest, provided that he retains his status as a traveler in other respects.<sup>56</sup> A traveler who enters an inn as a guest does not cease to be a guest by proposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance for a part or the whole of the entertainment, or paying for what he has occasion, as his wants are supplied. There is no reason why the innkeeper may not require payment in ad-

<sup>54</sup> *McDaniels v. Robinson*, 26 Vt. 316; *Grinnell v. Cook*, 3 Hill (N. Y.) 485; *Thickstun v. Howard*, 8 Blackf. (Ind.) 535; *Hickman v. Thomas*, 16 Ala. 666; *Russell v. Fagan* (Del.) 8 Atl. 258.

<sup>55</sup> The case of *York v. Grindstone*, 1 Salk. 388, is understood as deciding, by a divided court, that one, by leaving his horse at an inn, becomes a guest. And such was virtually the decision, inasmuch as defendant's lien as innkeeper was recognized, in regard to a horse left at his stable by a traveler who did not himself put up at the inn. And such lien does not exist as to horses put up at the stable of an innkeeper, by those who are not travelers and guests. See ante, p. 222. And see same case, as *Yorke v. Grindstone*, 2 Ld. Raym. 866; *Mason v. Thompson*, 9 Pick. (Mass.) 280; *Poet v. McGraw*, 25 Wend. (N. Y.) 653, 654; *McDaniels v. Robinson*, 26 Vt. 316, 332.

<sup>56</sup> *Norcross v. Norcross*, 53 Me. 169; *Hancock v. Rand*, 94 N. Y. 1; *Linn v. Dwinelle*, 7 Alb. Law J. 44; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Hall v. Pike*, 100 Mass. 495; *Walling v. Potter*, 35 Conn. 183, 185; *Richmond v. Smith*, 8 Barn. & C. 9, 11; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; *Parker v. Flint*, 12 Mod. 254, 255; *Allen v. Smith*, 12 C. B. (N. S.) 638.

vance, or why the guest may not pay in advance, for lodgings for a part or all the time he intends to remain as a guest at the inn.<sup>57</sup> A guest for a single night might make a special contract as to the price to be paid for his lodging, and, whether it were more or less than the usual price, it would not affect his character as a guest. The character of guests does not depend upon the payment of any particular price, but upon other facts.<sup>58</sup> If an inhabitant of a place makes a special contract with an innkeeper there, for board at his inn, he is a boarder, and not a traveler or a guest, in the sense of the law.<sup>59</sup> The cases show that, to entitle one to the privileges and protection of a guest, he must have the character of a traveler,—one who is a mere temporary lodger,—in distinction from one who engages for a fixed period at a certain agreed rate. The main test is that a guest must be a wayfarer, or transient, and it matters not how long he remains, provided he retains this character.<sup>60</sup>

The distinction between a guest and a boarder, and the liabilities of an innkeeper to each, were well illustrated in *Lusk v. Belote*.<sup>61</sup> The plaintiff's wife and children became inmates of defendant's hotel, in St. Paul, in August, and remained there until the next Octo-

<sup>57</sup> *Pinkerton v. Woodward*, 33 Cal. 557.

<sup>58</sup> *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417, 424; *Hall v. Pike*, 100 Mass. 495, 498; *Neal v. Wilcox*, 4 Jones (N. C.) 146, 148; *Bennet v. Mellor*, 5 Term R. 273.

<sup>59</sup> *Berkshire Woolen Co. v. Proctor*, supra; *Carter v. Hobbs*, 12 Mich. 52; *Shoecraft v. Bailey*, 25 Iowa, 553; *Pollock v. Landis*, 36 Iowa, 651; *Manning v. Wells*, 9 Humph. (Tenn.) 746; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72, 75; *Hancock v. Rand*, 94 N. Y. 1; *Lawrence v. Howard*, 1 Utah, 142; *Parkhurst v. Foster*, 1 Salk. 388; *Parker v. Flint*, 12 Mod. 254. And see *Chamberlain v. Masterson*, 26 Ala. 371; *Ewart v. Stark*, 8 Rich. (S. C.) 423; *Hursh v. Byers*, 29 Mo. 469.

<sup>60</sup> *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; *Curtis v. Murphy*, 63 Wis. 4, 22 N. W. 825; *Lusk v. Belote*, 22 Minn. 468; *Ewart v. Stark*, 8 Rich. (S. C.) 423; *Vance v. Throckmorton*, 5 Bush (Ky.) 41, 44; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; *Hancock v. Rand*, 94 N. Y. 1; *Johnson v. Reynolds*, 3 Kan. 251. In *Hall v. Pike*, 100 Mass. 495, a mechanic living in Boston was employed on a building in Cambridge (which is practically a part of Boston), and gave up his boarding house in Boston, and went to the house of defendant. Articles were stolen from his room, and he sued, not alleging negligence, but as guest, and he recovered.

<sup>61</sup> 22 Minn. 468.



ber. At the time they came to the hotel, the wife and children had been living in St. Paul for three or four years, sometimes keeping house, sometimes staying at an hotel or boarding house; the plaintiff, who was not a resident of the state, visiting them two or three times a year. He came to the hotel on the 10th of September, and remained about four weeks. There was an agreement for special rates for himself and his family, lower than transient rates. On the 20th of September, the watch of the plaintiff and jewelry of the children were stolen from the hotel. It was held that the plaintiff was a traveler, but the children were not, and the defendant was liable for the watch, but not for the jewelry. The court says, in substance: This strict liability exists only in favor of travelers. As to the family, they must be regarded as in fact dwellers in and inhabitants of St. Paul. They certainly were not travelers, in any just sense of the word. As to the husband, he was received there as a traveler, and in no other character. His status as a traveler, like any other status, once shown to exist, is to be presumed to have continued. Neither the agreement by which he was to pay special rates for himself and family, lower than those ordinarily charged for transient guests, nor the fact that he remained in the inn for a month, furnish any evidence that his character was changed from that of a traveler to that of a boarder.<sup>62</sup>

#### COMMENCEMENT OF RELATION.

#### 51. The relation of innkeeper and guest begins when the guest is received as such.

When a person applies to an innkeeper for entertainment, and is accepted by the innkeeper, he becomes a guest immediately. It was said in a Vermont case <sup>63</sup> "that taking a room is the decisive act to create the relation. That being done, the guest is charged, as

<sup>62</sup> See, also, as to distinction between guests and boarders, *Stewart v. McCready*, 24 How. Prac. (N. Y.) 62; *Jeffords v. Crump*, 12 Phila. (Pa.) 500; *Centlivre v. Ryder*, 1 Edm. Sel. Cas. (N. Y.) 273; *Hilton v. Adams*, 71 Me. 19; *Whitemore v. Haroldson*, 2 Lea (Tenn.) 312.

<sup>63</sup> *McDaniels v. Robinson*, 26 Vt. 316, 324. And see, as giving color to this view, *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32, 4 N. E. 398.

such, for his meals and lodging, whether he take them at the inn or with his friends, as any one may know who has had experience in such matters." However, it is clear, from what has been said in discussing who are guests, that one need not be assigned a room to create the relation.<sup>64</sup> The application for entertainment may be, and in fact often is, implied from the conduct of the person making the application, and he may be received as a guest in the same way. The actual assent of the innkeeper to receiving the guest is not necessary; it may be given by an employé or agent authorized to do so.<sup>65</sup>

#### RIGHTS AND LIABILITIES OF INNKEEPERS.

52. The rights and liabilities of an innkeeper will be considered under the following heads:

- (a) Duty to receive guests (p. 274).
- (b) Liability for guests' goods (p. 277).
- (c) Lien on guests' goods (p. 293).

#### SAME—DUTY TO RECEIVE GUESTS.

53. An innkeeper is bound to receive as guests all reputable persons who come in proper condition, and are willing and able to pay for their entertainment, so long as he has accommodations for them.

An innkeeper holds out his house as a public place to which travelers may resort, and of course surrenders some of the rights which he would otherwise have over it.<sup>66</sup> Holding it out as a place of ac-

<sup>64</sup> Since merely buying liquor has, as we have seen, been held sufficient to make one a guest. *Kopper v. Willis*, 9 Daly (N. Y.) 460; *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560; *Fitch v. Casler*, 17 Hun (N. Y.) 126, 127; *Atkinson v. Sellers*, 5 C. B. (N. S.) 442, 448; *Bennet v. Mellor*, 5 Term R. 273.

<sup>65</sup> *Gastenhofer v. Clair*, 10 Daly (N. Y.) 265; *Pinkerton v. Woodward*, 33 Cal. 557.

<sup>66</sup> The ground upon which these restrictions are imposed is that persons engaged in this vocation are in some sense servants of the public, and in conducting their business they exercise a privilege conferred upon them by the public, and they have secured to them by the law certain privileges and

accommodation for travelers, he cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them.<sup>67</sup> But he is not obliged to make his house a common receptacle for all comers, whatever may be their character or condition. He is not obliged to receive one who is not able to pay for his entertainment,<sup>68</sup> and there are considerations of greater importance than this. He is indictable if he usually harbor thieves, and is not bound to admit one whose notorious character as a thief furnishes good reason to suppose that he will purloin the goods or money of his guests.<sup>69</sup> So, he is liable if his house is disorderly, and cannot be held to wait until an affray is begun before he interposes, but may exclude common brawlers, and any one who comes with intent to commit an assault or make an affray.<sup>70</sup> So he may prohibit the entry of one whose misconduct in other particulars, or whose filthy condition, would subject his guests to annoyance.<sup>71</sup>

rights which are not enjoyed by the members of the public generally. *Bowlin v. Lyon*, 67 Iowa, 536, 25 N. W. 766. And cf. *Beale v. Posey*, 72 Ala. 323, 330.

<sup>67</sup> *Kirkman v. Shawcross*, 6 Term R. 14, 17; *Rex v. Ivens*, 7 Car. & P. 213. That he cannot refuse accommodation to an infant or a married woman traveling alone, see *Watson v. Cross*, 2 Duv. (Ky.) 147. In a note to *Walling v. Potter*, 9 Am. Law Reg. (N. S.) 618, it is said that an innkeeper is not bound to receive a townsman, but no authority is given for the statement. The point does not seem to have come up for decision. An innkeeper is not bound to receive and keep horses or other property of a person who is neither a traveler nor a guest. *Grinnell v. Cook*, 3 Hill (N. Y.) 485.

<sup>68</sup> *Thompson v. Lacy*, 3 Barn. & Ald. 283, 286; *Watson v. Cross*, 2 Duv. 147; *Pinkerton v. Woodward*, 33 Cal. 557; *Grinnell v. Cook*, 3 Hill (N. Y.) 485. The price of accommodation need not be tendered unless it is demanded or the refusal to receive is on that ground. *Rex v. Ivens*, 7 Car. & P. 213. But see *Fell v. Knight*, 8 Mees. & W. 269, 276.

<sup>69</sup> *Markham v. Brown*, 8 N. H. 523, 528; 1 Hawk. P. C. c. 78, § 1; *Bau. Abr.* "Inns," A.

<sup>70</sup> *Markham v. Brown*, 8 N. H. 523, 528; 1 Hawk. P. C. c. 78, § 1. But it has been held that an innkeeper is not justified in refusing to receive a militiaman merely because other members of the same company who were then guests had not conducted themselves in a proper manner. *Atwater v. Sawyer*, 76 Me. 539.

<sup>71</sup> *Markham v. Brown*, 8 N. H. 523, 528; *Pinkerton v. Woodward*, 33 Cal. 557; *Thompson v. Lacy*, 3 Barn. & Ald. 283. As to an innkeeper's duty to

He has a right to prohibit common drunkards and idle persons from entering, and to require them, and others before mentioned, to depart, if they have already entered.<sup>72</sup> And any person entering, not for a lawful purpose, but to do an unlawful act,—as to commit an assault upon one lawfully there,—must be deemed a trespasser in entering for such unlawful purpose.<sup>73</sup>

As he is bound to admit travelers, under certain limitations, he may likewise be held, under proper limitations, to admit those who have business with them as such. This may be considered as derived from the right of the traveler.<sup>74</sup> It is conceded that he may be bound to permit the entry of persons who have been sent for by the guest. But the rule is not to be limited, in all cases, to this. There may be such connection between travelers and those engaged in their conveyance that the latter, although not specially sent for, may have a right to enter a common inn; or such that the landlord, if he give a general license to some of those whose business is connected with his guests, in their character as travelers, cannot lawfully exclude others, pursuing the same business, and who enter for a similar object.<sup>75</sup> There seems to be no good reason why the landlord should have the power to discriminate in such cases, and to say that one shall be admitted and another excluded, so long as each has the same connection with his guests, the same lawful purpose, comes in a like suitable condition, and with as proper a demeanor, any more than he has the right to admit one traveler

receive one who comes with dogs, and insists on their being admitted to the inn, see *Reg. v. Rymer*, 2 Q. B. Div. 136.

<sup>72</sup> *Com. v. Mitchel*, 2 Pars. Eq. Cas. (Pa.) 431; *Howell v. Jackson*, 6 Car. & P. 723; *Moriarty v. Brooks*, Id. 684; *Rex v. Ivens*, 7 Car. & P. 213. And see *Com. v. Power*, 7 Metc. (Mass.) 596; *McKee v. Owen*, 15 Mich. 115.

<sup>73</sup> *Markham v. Brown*, 8 N. H. 523.

<sup>74</sup> *Com. v. Mitchel*, 2 Pars. Eq. Cas. (Pa.) 431.

<sup>75</sup> *Markham v. Brown*, 8 N. H. 523, 529. A regulation made by an innkeeper that proprietors of livery stables, and their agents or servants, shall not be allowed to enter his hotel for the purpose of soliciting patronage for their business from his guests, is a reasonable one; and, after notice to depart, a person violating it may be lawfully expelled from the house, if excessive force is not used in ejecting him. *State v. Steele*, 106 N. C. 766, 11 S. E. 478. Cf. "Carriers," post, p 506.

and exclude another, merely because it is his pleasure.<sup>76</sup> If one comes to injure his house, or if his business operates directly as an injury, that will alter the case.<sup>77</sup> And perhaps there may be cases in which he may have a right to exclude all but travelers and those who have been sent for by them.<sup>78</sup>

An innkeeper who has an inn stable is under the same obligation to receive and care for horses as he is to receive the person to whom they belong.<sup>79</sup> A landlord is not bound to provide for a guest the precise room the latter may select.<sup>80</sup> All the law requires him to do is to find for his guests reasonable and proper accommodations.<sup>81</sup> For an improper refusal to receive a person as a guest, an innkeeper is liable to a civil action by the person aggrieved.<sup>82</sup>

#### SAME—LIABILITY FOR GUESTS' GOODS.

**54. At common law an innkeeper is liable as an insurer of his guest's goods, unless they are lost—**

- (a) By accidental fire (p. 280).
- (b) By act of God or a public enemy (p. 281).
- (c) By reason of inherent nature (p. 281).
- (d) Through fault of the guest, or his servant or companion (p. 282).

<sup>76</sup> While they have the right, doubtless, to make reasonable and proper rules for the conduct of the business in which they are engaged, they are not permitted to discriminate in favor of or against any class. *Markham v. Brown*, 8 N. H. 523.

<sup>77</sup> See *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258.

<sup>78</sup> *Markham v. Brown*, 8 N. H. 523, 529.

<sup>79</sup> *Schouler*, Bailm. 288; *Bac. Abr.* "Inns," etc., c. 3.

<sup>80</sup> *Fell v. Knight*, 8 Mees. & W. 269.

<sup>81</sup> *Fell v. Knight*, 8 Mees. & W. 269. There are some dicta to the effect that an innkeeper is not bound to convert his inn into a warehouse, and is only bound to receive such goods of his guests as his inn will conveniently accommodate. *Needles v. Howard*, 1 E. D. Smith (N. Y.) 54, 61. And see *Neal v. Wilcox*, 4 Jones (N. C.) 146.

<sup>82</sup> *Watson v. Cross*, 2 Duv. (Ky.) 147, 148. As to the civil rights act, see *Black*, *Const. Law*, 406; *The Civil Rights Bill*, 1 *Hughes*, 541, Fed. Cas. No. 2,774.



There is an almost hopeless conflict in the rules laid down by the courts and text writers as to the correct rule of an innkeeper's liability for the goods of a guest lost while in his custody as innkeeper.<sup>83</sup> This conflict, however, is rather in the dicta of the courts than in the decisions themselves. There are, in general, three distinct views as to this liability, which have been aptly called "the doctrines of prima facie liability, superior force, and strict insurance." These views are well stated in *Sibley v. Aldrich*,<sup>84</sup> as follows: "Three different rules appear to be laid down on this subject in different authorities: (1) That the innkeeper is prima facie liable for the loss of goods in his charge, but may discharge himself by showing that the goods were lost without his negligence or default. \* \* \* (2) That the innkeeper is discharged by showing how the accident happened, and that it happened by inevitable accident or irresistible force, though the accident might not amount to what the law denominates the act of God, and the force might not be the power of a public enemy. \* \* \* (3) That the innkeeper is liable unless the loss was caused by the act of God or the public enemy, or by the fault, direct or implied, of the guest."

The prima facie view is stated by Mr. Story<sup>85</sup> as follows: "Innkeepers are not responsible to the same extent as common carriers. The loss of the goods of a guest while at an inn will be presumptive evidence of negligence on the part of the innkeeper or of his domestics. But he may, if he can, repel this presumption, by showing that there has been no negligence whatsoever, or that the loss is attributable to the personal negligence of the guest himself, or that it has been occasioned by inevitable accident or by superior force." So, in *Howth v. Franklin*,<sup>86</sup> Roberts, J., said for the court: "When property committed to the custody of an innkeeper by his guest is lost, the presumption is that the innkeeper is liable for it, and he can relieve himself from that liability by showing that he has used extreme diligence. What facts will excuse him is a question, perhaps, not very well settled, but it is well settled that he cannot ex-

<sup>83</sup> *McDaniels v. Robinson*, 26 Vt. 316; *Merritt v. Claghorn*, 23 Vt. 177; *Cutler v. Bonney*, 30 Mich. 259.

<sup>84</sup> 33 N. H. 553.

<sup>85</sup> *Bailm.* 472.

<sup>86</sup> 20 Tex. 798.

cuse himself without showing that he has used extreme care and diligence in relation to the property lost.”<sup>87</sup>

The second view, or that of superior force, is stated in *McDaniels v. Robinson*,<sup>88</sup> where Redfield, C. J., said for the court: “In *Richmond v. Smith*,<sup>89</sup> Lord Tenterden says, in regard to goods stolen from the custody of an innkeeper, ‘The situation of an innkeeper is precisely analogous to that of a carrier.’ This may be too strongly expressed, if applied to all cases of goods taken from the custody of an innkeeper. For it may be done by superior force, and without his fault, and still not the force of a public enemy, which is necessary to be shown to excuse a common carrier. But, in regard to goods stolen from the custody of an innkeeper, and no evidence to show how it was done, or by whom, the liability is the same as that of a carrier.”<sup>90</sup>

Under the doctrine of strict insurance, innkeepers are under the same liability as common carriers. They are insurers of the property of their guests committed to their care, and are liable for its loss, unless caused by the act of God, a public enemy, or the neglect or fault of the owner or his servants. This strictness of liability, it is said, is necessary, in order to protect travelers against any collusion between the innkeeper and his servants, and to compel him to take care that no improper persons be admitted into his house. His charge for the entertainment of his guests is supposed to cover this risk, and he also has a lien upon their property intrusted to his care, to indemnify him against loss. Upon proof of loss, the burden of bringing the case within the exceptions to his

<sup>87</sup> Citing *Edwards*, Bailm. 406; 2 Kent, Comm. 592. See, also, *Dawson v. Chamney*, 5 Q. B. 164; *Metcalf v. Hess*, 14 Ill. 129; *Johnson v. Richardson*, 17 Ill. 302; *Laird v. Eichold*, 10 Ind. 212; *McDaniels v. Robinson*, 26 Vt. 316; *Russell v. Fagan* (Del.) 8 Atl. 258, 259; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; *Baker v. Dessauer*, 49 Ind. 28; *Howe Mach. Co. v. Pease*, 49 Vt. 477; *Howth v. Franklin*, 20 Tex. 798; *Dunbier v. Day*, 12 Neb. 506, 12 N. W. 109.

<sup>88</sup> 26 Vt. 316.

<sup>89</sup> 8 Barn. & C. 9.

<sup>90</sup> And see *Merritt v. Claghorn*, 23 Vt. 177; *Metcalf v. Hess*, 14 Ill. 129; *Johnson v. Richardson*, 17 Ill. 302; *Howth v. Franklin*, 20 Tex. 798; *McDaniels v. Robinson*, 26 Vt. 316; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; *Woodworth v. Morse*, 18 La. Ann. 156; *Cutler v. Bonney*, 30 Mich. 259.

liability is upon the innkeeper; and proof of the strictest care on his part avails him nothing, if it falls short of this.<sup>91</sup>

*Accidental Fires.*

On principle, the rule of strict insurance seems to be most consistent with the theory on which an exceptional liability is imposed on innkeepers. But it is doubtful if this is sustained by the cases; for it is held, by the weight of authority, that an innkeeper is not liable for goods of a guest which are destroyed by an accidental fire,—that is, by a fire which the innkeeper shows was in no way caused by his own negligence or that of his servants.<sup>92</sup> The contrary was held in New York, in *Hulett v. Swift*;<sup>93</sup> but a statute was passed soon after, exempting innkeepers from liability for such fires.<sup>94</sup> And so, by statutes in a number of states, innkeepers are answerable to their guests, in case of loss by fire, only for ordinary and reasonable care in the custody of their baggage or other property.<sup>95</sup> And an action cannot, in these states, be maintained

<sup>91</sup> See *Shaw v. Berry*, 31 Me. 479; *Mason v. Thompson*, 9 Pick. (Mass.) 280; *Hulett v. Swift*, 33 N. Y. 571; *Sibley v. Aldrich*, 33 N. H. 553; *Dunbier v. Day*, 12 Neb. 596, 12 N. W. 109; *Morgan v. Ravey*, 6 Hurl. & N. 265; *Grinnell v. Cook*, 3 Hill (N. Y.) 485; *Burgess v. Clements*, 4 Maule & S. 306; *Richmond v. Smith*, 8 Barn. & C. 9; *Kent v. Shuckard*, 2 Barn. & Adol. 803; *Armistead v. White*, 6 Eng. Law & Eq. 349; *Mateer v. Brown*, 1 Cal. 221; *Norcross v. Norcross*, 53 Me. 163; *Burrows v. Trieber*, 21 Md. 320; *Manning v. Wells*, 9 Humph. (Tenn.) 746; *Thickstun v. Howard*, 8 Blackf. (Ind.) 535, 537; *Sasseen v. Clark*, 37 Ga. 242; *Purvis v. Coleman*, 21 N. Y. 111, 112, 117; *Gile v. Libby*, 36 Barb. 70, 74; *Ingalsbee v. Wood*, 36 Barb. 452, 458; *Washburn v. Jones*, 14 Barb. 193, 195; *McDonald v. Edgerton*, 5 Barb. 560, 564; *Taylor v. Monnot*, 4 Duer, 116; *Stanton v. Leland*, 4 E. D. Smith, 88, 94; *Piper v. Manny*, 21 Wend. 282, 284; *Clute v. Wiggins*, 14 Johns. 175; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417, 427; *Towson v. Havre de Grace Bank*, 6 Har. & J. 47; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; 1 Smith, Lead. Cas. (Hare & W. notes) 307.

<sup>92</sup> *Cutler v. Bonney*, 30 Mich. 259; *Merritt v. Claghorn*, 23 Vt. 177. And see *Vance v. Throckmorton*, 5 Bush, 42; *Mowers v. Fethers*, 61 N. Y. 34.

<sup>93</sup> 33 N. Y. 571.

<sup>94</sup> See *Faucett v. Nicholls*, 64 N. Y. 377.

<sup>95</sup> New York, Laws 1866, c. 638; Wisconsin, Sanb. & B. Ann. St. 1889, § 1726; Missouri, Rev. St. 1889, § 5512; Massachusetts, Pub. St. c. 102, § 15; Maine, Rev. St. 1883, c. 27, § 6. 1 Stim. Am. St. Law, § 4392.

against an innkeeper for such a loss, when there is no proof of want of such ordinary and reasonable care.<sup>96</sup>

*Loss by Robbery.*

So, too, where the question of an innkeeper's liability for goods lost by robbery has come squarely before the court, there has been in each case some circumstance which the court regarded as negligence on the part of the innkeeper, and, though he has been held liable in each instance,<sup>97</sup> these decisions cannot be cited with confidence, as sustaining the proposition that the innkeeper would be responsible for goods so lost, in the absence of any negligence, nor, on the other hand, has any reported case been found which has held an innkeeper not liable.<sup>98</sup>

*Act of God or a Public Enemy.*

Although no cases seem to have arisen where an innkeeper's liability for property lost by act of God or a public enemy has been in question, there is no reason for supposing he would be liable in such cases, since a common carrier is not.<sup>99</sup>

*Inherent Nature—Injuries to Horses.*

If a horse becomes suddenly diseased, or if fruits perish in the package as delivered to the landlord, the natural presumption is that this condition occurred in the due course and order of things, and from the inherent qualities of the property; and the innkeeper is not liable.<sup>100</sup> That is, when a guest puts a horse in the stables of the inn, and the horse dies from causes for which the innkeeper is in no way responsible, then the latter is not liable for the loss.<sup>101</sup> But when the loss does not arise from the inherent nature of the animal the innkeeper is liable.<sup>102</sup> The death or injury while in

<sup>96</sup> Burnham v. Young, 72 Me. 273.

<sup>97</sup> Pinkerton v. Woodward, 33 Cal. 557; Woodward v. Birch, 4 Bush, 510. And see Mateer v. Brown, 1 Cal. 221, 231.

<sup>98</sup> The innkeeper is exonerated in Louisiana. Civ. Code, art. 2939; Woodworth v. Morse, 18 La. Ann. 156.

<sup>99</sup> See post, p. 351.

<sup>100</sup> Howe Mach. Co. v. Pease, 49 Vt. 477.

<sup>101</sup> Howe Mach. Co. v. Pease, supra; Metcalf v. Hess, 14 Ill. 129.

<sup>102</sup> Seymour v. Cook, 53 Barb. (N. Y.) 451; Sibley v. Aldrich, 33 N. H. 553. But see Dawson v. Chamney, 5 Q. B. 164. This liability exists only as to the horses of guests. Thickstun v. Howard, 8 Blackf. (Ind.) 535. An inn-



the innkeeper's charge is sufficient to make him liable, unless he shows facts which excuse him.<sup>103</sup>

*Loss by Theft.*

If the goods of a guest are stolen by the innkeeper's servants or domestics, by another guest,<sup>104</sup> or by someone from outside the inn, the innkeeper is bound to make restitution; for it is his duty to provide honest servants, and to exercise an exact vigilance over all persons coming into his house, as guests or otherwise. His responsibility extends to all his servants and domestics, and he is bound in every event to pay for them, if stolen,<sup>105</sup> unless they were stolen by a servant or companion of the guest. In case of a loss by theft, it is no excuse for the innkeeper that he was sick or absent from home at the time; for he is bound, in such cases, to provide honest and faithful servants according to the confidence reposed in him by the public.<sup>106</sup> If an innkeeper allows persons to act as servants or agents during his absence in his hotel, he is responsible for their conduct, and for the loss of the goods deposited therein as directed by such servants or agents.<sup>107</sup>

*Fault of Guest or His Servant or Companion.*

An innkeeper is not liable for the loss of a guest's property, when the loss is due to the fault or negligence of the guest himself.<sup>108</sup> Nor is the innkeeper liable for losses caused by the serv-

keeper is liable for damage to a guest's horse by the horse of another guest, without any negligence on the part of the innkeeper. *Sibley v. Aldrich*, 33 N. H. 553. An innkeeper is liable for horses of guests injured or killed by negligence in securing them, or by an imperfect and badly-constructed stable. *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179.

<sup>103</sup> *Hill v. Owen*, 5 Blackf. (Ind.) 323.

<sup>104</sup> *Gile v. Libby*, 36 Barb. (N. Y.) 70; *Dessauer v. Baker*, 1 Wils. (Ind.) 429.

<sup>105</sup> *Houser v. Tully*, 62 Pa. St. 92; *Walsh v. Porterfield*, 87 Pa. St. 376; *Dunbier v. Day*, 12 Neb. 596, 12 N. W. 109; *Spring v. Hager*, 145 Mass. 186, 13 N. E. 479; *Smith v. Wilson*, 36 Minn. 334, 31 N. W. 176; *Fuller v. Coats*, 18 Ohio St. 343; *Armistead v. Wilde*, 17 Q. B. 261; *Burgess v. Clements*, 4 Maule & S. 306; *Calye's Case*, 8 Coke, 32.

<sup>106</sup> *Houser v. Tully*, 62 Pa. St. 92; *Walsh v. Porterfield*, 87 Pa. St. 376.

<sup>107</sup> *Rockwell v. Proctor*, 39 Ga. 105, 107.

<sup>108</sup> *Purvis v. Coleman*, 21 N. Y. 111; *Fowler v. Dorlon*, 24 Barb. (N. Y.) 384; *Lanier v. Youngblood*, 73 Ala. 587; *Spring v. Hager*, 145 Mass. 186, 13 N.



ants or companions of the guest.<sup>109</sup> Thus, an unnecessary display of money or valuables, or leaving them where they would tempt thieves, may be negligence.<sup>110</sup> But failure to lock or bolt his door is not necessarily negligence on the part of the guest.<sup>111</sup> It is only evidence of negligence.<sup>112</sup> Nor is the innkeeper exonerated when a theft is committed by a fellow guest with whom the owner of the property stolen had consented to occupy the same room.<sup>113</sup>

To enable the innkeeper to discharge his duty, and to secure the property of the traveler from loss, while in a house ever open to the public, it may, in many instances, become absolutely necessary for him to provide special means, and to make necessary regulations and requirements to be observed by the guest, to secure the safety

E. 479; *Walsh v. Porterfield*, 87 Pa. St. 376; *Mason v. Thompson*, 9 Pick. (Mass.) 280; *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417; *Jalle v. Cardinal*, 35 Wis. 118, 130; *Hadley v. Upshaw*, 27 Tex. 547; *Burrows v. Trieber*, 21 Md. 320; *Elcox v. Hill*, 98 U. S. 218; *Morgan v. Ravey*, 6 Hurl. & N. 265; *Cashill v. Wright*, 6 El. & Bl. 891; *Oppenheim v. Hotel Co.*, L. R. 6 C. P. 515. But see *Rubenstein v. Cruikshanks*, 54 Mich. 199, 19 N. W. 954. An innkeeper is liable for the safe-keeping of the valise and box of a peddler, his guest, although he was not notified of the nature and value of their contents, and the peddler was too drunk to take proper care of it. *Rubenstein v. Cruikshanks*, 54 Mich. 199, 19 N. W. 954. Evidence of gross neglect of the owner of property, to exempt the innkeeper from liability for its loss, must be confined to the period while he was a guest at the innkeeper's house. *Burrows v. Trieber*, 21 Md. 320.

<sup>109</sup> *Houser v. Tully*, 62 Pa. St. 92.

<sup>110</sup> *Armistead v. Wilde*, 17 Q. B. 261; *Cashill v. Wright*, 6 El. & Bl. 891.

<sup>111</sup> *Buddenburg v. Benner*, 1 Hilt. (N. Y.) 84; *Classen v. Leopold*, 2 Sweetney (N. Y.) 705; *Gile v. Libby*, 36 Barb. (N. Y.) 70; *Murchison v. Sergeant*, 69 Ga. 206; *Bohler v. Owens*, 60 Ga. 185; *Lanier v. Youngblood*, 73 Ala. 587, 594; *Spring v. Hager*, 145 Mass. 186, 13 N. E. 479; *Batterson v. Vogel*, 10 Mo. App. 235; *Profflet v. Hall*, 14 La. Ann. 530; *Spice v. Bacon*, 36 Law T. (N. S.) 896; *Herbert v. Markwell*, 45 Law T. (N. S.) 649; *Morgan v. Ravey*, 2 Fost. & F. 283, 6 Hurl. & N. 265; *Oppenheim v. Hotel Co.*, L. R. 6 C. P. 515; *Mitchell v. Woods*, 16 Law T. (N. S.) 676.

<sup>112</sup> *Spring v. Hager*, 145 Mass. 186, 13 N. E. 479; *Murchison v. Sergeant*, 69 Ga. 206; *Oppenheim v. Hotel Co.*, L. R. 6 C. P. 515; *Spice v. Bacon*, 36 Law T. (N. S.) 896; *Herbert v. Markwell*, 45 Law T. (N. S.) 649.

<sup>113</sup> *Olson v. Crossman*, 31 Minn. 222, 17 N. W. 375; *Gile v. Libby*, 36 Barb. (N. Y.) 70; *Buddenburg v. Benner*, 1 Hilt. (N. Y.) 84.

of his property. When such means and requirements are reasonable and proper for that purpose, and they are brought to the knowledge of the guest, with the information that, if not observed by him, the innkeeper will not be responsible, ordinary prudence, the interest of both parties, and public policy would require of the guest a compliance therewith; and if he should fail to do so, and his goods are lost solely for that reason, he would justly and properly be chargeable with negligence. To hold otherwise would subject a party, without fault, to the payment of damages to a party for loss occasioned by his own negligence, and would be carrying the liability of innkeepers to an unreasonable extent.<sup>114</sup>

#### SAME—FOR WHAT PROPERTY LIABLE.

55. The innkeeper's liability extends to all the goods of his guests which come to the inn, except—

EXCEPTION—(a) Goods for show or sale (p. 287).

(b) Goods retained in exclusive custody of the guest (p. 289).

#### *Goods of Guests Only.*

Innkeepers are not liable, as such, for goods deposited with them by any but guests of their inns.<sup>115</sup> While an individual proprietor

<sup>114</sup> Fuller v. Coats, 18 Ohio St. 343; Purvis v. Coleman, 21 N. Y. 111; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417; Cashill v. Wright, 6 El. & Bl. 891.

<sup>115</sup> Towson v. Havre de Grace Bank, 6 Har. & J. (Md.) 47; McDaniels v. Robinson, 28 Vt. 387; Grinnell v. Cook, 3 Hill (N. Y.) 485. If a servant is robbed of his master's money or goods while a guest at an inn, the master may maintain an action against the innkeeper. Towson v. Havre de Grace Bank, *supra*. This principle applied to one who hires a horse and chaise from the owner, and intrusts them to an innkeeper. Mason v. Thompson, 9 Plck. 280. A guest who is a mere depositary of the goods he brings with him may maintain an action against the innkeeper for their loss. Kellogg v. Sweeney, 1 Lans. (N. Y.) 397. Plaintiff's stallion stood at defendant's inn certain days each week, under an agreement, made for the season, for serving mares. Plaintiff had the key to the stall, and fed and cared for the horse. Defendant furnished the oats for the horse, and meals for the plaintiff, at a price less than the ordinary rates to travelers. Held, that defend-

of an inn may incur a liability as bailee for the safe-keeping of goods which he has voluntarily undertaken to keep for others than guests, it is not within the course of employment of a mere clerk of such innkeeper to receive on deposit the goods of any except guests of the inn; and if he does so it is a transaction between him and the owner, and no liability for the loss of such goods attaches to the innkeeper.<sup>116</sup>

*More than is Necessary for Traveling.*

The liability of an innkeeper for a loss by his guest extends to all the movable goods and money which are placed within the inn, and is not restricted to such things and sums only as are necessary and designed for the ordinary traveling expenses of the guest.<sup>117</sup> It is sometimes claimed that an innkeeper is liable only for such an amount of money as is necessary for the reasonable expenses of the guest. This distinction is sought to be maintained upon the analogy to the case of a carrier of passengers, who is liable only for money or articles convenient to the traveler on his journey, and not for goods or merchandise, as such.<sup>118</sup> But this contention is not supported by the cases, and innkeepers are held liable for goods which are not strictly baggage.<sup>119</sup> But, as to the amount of money for which an innkeeper may be made liable, it

ant's custody was not that of innkeeper, and that, therefore, he was not liable for the destruction of the barn and horse by fire without negligence on his part. *Mowers v. Fethers*, 61 N. Y. 34.

<sup>116</sup> *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32, 4 N. E. 398.

<sup>117</sup> *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417; *Towson v. Havre de Grace Bank*, 6 Har. & J. 47; *Wilkins v. Earle*, 44 N. Y. 172; *Johnson v. Richardson*, 17 Ill. 302, 305. Cf. *Simon v. Miller*, 7 La. Ann. 360; *Weisenger v. Taylor*, 1 Bush (Ky.) 275. But it is otherwise by statute in Maine. See *Noble v. Milliken*, 74 Me. 225.

<sup>118</sup> See post, "Carriers," p. 383.

<sup>119</sup> *Taylor v. Monnot*, 4 Duer, 116; *Kellogg v. Sweeney*, 1 Lans. (N. Y.) 397; *Wilkins v. Earle*, 44 N. Y. 172; *Needles v. Howard*, 1 E. D. Smith (N. Y.) 54; *Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417; *Rubenstein v. Cruikshanks*, 54 Mich. 199, 19 N. W. 954; *Smith v. Wilson*, 36 Minn. 334, 31 N. W. 176; *Quinton v. Courtney*, Hayw. (N. C.) 40; *Sasseen v. Clark*, 37 Ga. 212; *Kent v. Shuckard*, 2 Barn. & Adol. 503; *Armistead v. White*, 6 Eng. Law & Eq. 349. In *Clute v. Wiggins*, 14 Johns. (N. Y.) 175, the guest recovered for certain bags of wheat and barley. In *Piper v. Manny*, 21 Wend. (N. Y.) 282, the recovery was for a tub of butter. In

has been said that: "It would be too great a responsibility if that liability could be extended so as to cover any conceivable amount of money or gold dust which the traveler, after he has become a guest, might be disposed to thrust into the custody of his host, and thus compel him to become the insurer of its safety. We think, in this case, it is a question which the jury should decide, whether the bundle was taken to the inn of the defendant by the plaintiff in his character of guest, in which event the defendant's liability would cover all losses, or whether, after the plaintiff became a guest with the defendant, it was deposited there in the nature of an ordinary bailment, in which case the defendant would be bound to exercise no more, at the furthest, than ordinary diligence, and would be answerable, certainly, for nothing more than ordinary neglect."<sup>120</sup> And in Maryland it is held that money, to constitute a part of a guest's baggage for which the innkeeper is responsible, should be of such an amount only as would be convenient to meet his traveling expenses, and that, to arrive at this, the condition of the guest, his mode of life, his habits, tastes, the nature, character, and objects of his journey, must be taken into consideration by the jury.<sup>121</sup>

*Goods Arriving with Guest.*

No reason is perceived why the responsibility of the innkeeper for the safe-keeping of his guest's property should be limited to such property as the guest may have in his immediate possession at the moment of his arrival at the inn. The relation of innkeeper and guest, out of which springs the responsibility, is the same, whether the guest's baggage is conveyed to the inn with him, or at a subsequent time; or whether he then has in his possession, or afterwards procures, the money, clothing, etc., that he may need on his journey.<sup>122</sup>

*Sneider v. Geiss*, 1 Yeates (Pa.) 34, the innkeeper was held liable for 230 Spanish milled dollars. In *Hulett v. Swift*, 33 N. Y. 571, the plaintiff recovered the value of his horses, wagon, and a load of buckskin goods.

<sup>120</sup> *Mateer v. Brown*, 1 Cal. 221.

<sup>121</sup> *Treiber v. Burrows*, 27 Md. 130; *Pettigrew v. Barnum*, 11 Md. 434, 448; *Giles v. Fauntleroy*, 13 Md. 126.

<sup>122</sup> *Pinkerton v. Woodward*, 33 Cal. 557; *Mateer v. Brown*, 1 Cal. 221.

*Goods for Show or Sale.*

Chancellor Kent says <sup>123</sup> that "if a guest applies for a room in an inn for a purpose of business distinct from his accommodation as a guest, the particular responsibility does not extend to goods lost or stolen from that room."<sup>124</sup> Thus, if a person, going into an hotel as a guest, takes to his room not ordinary baggage, or those articles which generally accompany the traveler, but valuable merchandise, such as watches and jewelry, and keeps them there for show and sale, and from time to time invites parties into his room to inspect and to purchase, unless there is some special circumstance in the case showing that the innkeeper assumes the same responsibility, as for ordinary baggage, as to such merchandise, the special obligations imposed by the common law do not exist.<sup>125</sup>

*Goods Received within the Inn.*

The liability of innkeepers does not attach, unless the goods are brought within the inn, or otherwise placed within their custody in some customary and reasonable way.<sup>126</sup> It is not necessary that the goods should be placed in their special keeping, but it is sufficient if they are deposited in the house of the innkeeper, or intrusted to the care of his family or servants.<sup>127</sup> The innkeeper's liability extends to goods in all parts of the inn, and to the out buildings connected with the inn,<sup>128</sup> and even to goods not actually

<sup>123</sup> 2 Comm. 596.

<sup>124</sup> Story, Bailm. § 476; Fisher v. Kelsey, 121 U. S. 383, 7 Sup. Ct. 929, affirming 16 Fed. 71; Myers v. Cottrill, 5 Biss. 465, Fed. Cas. No. 9,985; Burgess v. Clements, 4 Maule & S. 306.

<sup>125</sup> Myers v. Cottrill, 5 Biss. 465, Fed. Cas. No. 9,985; Mowers v. Fethers, 61 N. Y. 34; Fisher v. Kelsey, 121 U. S. 383, 7 Sup. Ct. 929; Becker v. Haynes, 29 Fed. 441.

<sup>126</sup> Mason v. Thompson, 9 Pick. (Mass.) 280; Piper v. Manny, 21 Wend. (N. Y.) 282; Albin v. Presby, 8 N. H. 408; Minor v. Staples, 71 Me. 316; Norcross v. Norcross, 53 Me. 163; Bennet v. Mellor, 5 Term R. 273; Kent v. Shuckard, 2 Barn. & Adol. 803.

<sup>127</sup> 2 Kent, Comm. 593; Story, Bailm. § 479; McDonald v. Edgerton, 5 Barb. (N. Y.) 560; Rockwell v. Proctor, 39 Ga. 105.

<sup>128</sup> Albin v. Presby, 8 N. H. 408, 410; Burrows v. Trieber, 21 Md. 320; McDonald v. Edgerton, 5 Barb. (N. Y.) 560; Bennet v. Mellor, 5 Term R. 273; Richmond v. Smith, 8 Barn. & C. 9. But see Sanders v. Spencer, 3 Dyer, 266b. In Clute v. Wiggins, 14 Johns. (N. Y.) 175, the guest put his sleigh, loaded with wheat, into an outhouse appurtenant to the inn, where loads of



within the inn precincts, if so left by the direction of the innkeeper or his servants.<sup>129</sup> Thus, where an hotel keeper sends his porter to the cars to receive the baggage of persons traveling, and baggage is delivered to the porter, and the traveler becomes the guest of the hotel, the liability of the innkeeper as such for the baggage begins on the delivery to the porter.<sup>130</sup>

An innkeeper who also keeps a sea-bathing house, separate from the inn, is not liable as an innkeeper for goods and clothes of his guests, left there while the guests were bathing, and stolen therefrom. One may be an innkeeper without being a bath-house keeper, or he may be a bath-house keeper without being an innkeeper; or the same person may engage in both employments, just as a livery stable keeper may also be a common carrier of passengers; but his doing so will not make him responsible in the one capacity for liabilities incurred in the other. This does not apply to bath rooms attached to or kept within hotels, but to separate buildings, erected upon the seashore, and used, not as bath

the kind were usually received, but without specially committing it to the innkeeper. The grain was stolen in the night, and the innkeeper was held liable for the loss. It would be otherwise if a traveler, on arriving at an inn, should place his loaded wagon under an open shed, not appurtenant to the inn, and near the highway, and make no request to the innkeeper to take it into his custody.

<sup>129</sup> An innkeeper is responsible for the safe-keeping of a load of goods belonging to a traveler who stops at his inn for the night, if the carriage containing the goods be deposited in a place designated by the servant of the innkeeper, although such place be an open uninclosed space near the public highway. *Hilton v. Adams*, 71 Me. 19. But see *Albin v. Presby*, 8 N. H. 408. So, an innkeeper, on a fair day, upon being asked by a traveler, then driving a gig, of which he was the owner, "whether he had room for the horse," put the horse into the stable of the inn, received the traveler, with some goods, into the inn, and placed the gig in the open street, without the inn yard, where he was accustomed to place the carriages of his guests on fair days. The gig having been stolen from thence, held, that the innkeeper was answerable. *Jones v. Tyler*, 28 E. C. L. 138.

<sup>130</sup> *Sasseen v. Clark*, 37 Ga. 242; *Dickenson v. Winchester*, 4 Cush. (Mass.) 114. An innkeeper employing a transportation company to furnish an omnibus and wagon to receive guests of the hotel at a railway depot, and to transport them and their baggage to the hotel, is liable if the baggage of a guest delivered to such company is by it lost before reaching the hotel. *Coskery v. Nagle*, 83 Ga. 696.

rooms, but as places in which those who bathe in the sea change their garments, and leave their clothes and other valuables while so bathing.<sup>181</sup>

*Goods in Exclusive Possession of Guest.*

An innkeeper may be exonerated by showing that the guest whose goods have been lost took them into his exclusive custody, for the innkeeper's responsibility is only coextensive with his custody and control of the goods.<sup>182</sup> The rule is the same when the guest intrusts his property to another guest or inmate.<sup>183</sup> But retaining money or valuables on his own person is not necessarily such exclusive possession as will excuse the innkeeper,<sup>184</sup> nor is the fact that the guest directs his goods to be kept in a certain part of the inn,<sup>185</sup> or ordered them taken to his bedroom.<sup>186</sup>

SAME—LIMITED LIABILITY.

**56. An innkeeper may be exempted from liability—**

(a) By contract or custom (p. 289).

(b) By statute (p. 290).

(1) For losses above a certain amount, in some states (p. 290).

(2) By notice, in many states, for property not delivered to the innkeeper to be put in his safe (p. 291).

*By Contract.*

The exceptional liability of an innkeeper may, no doubt, be restricted, in a measure at least, by an express contract with the

<sup>181</sup> *Minor v. Staples*, 71 Me. 316.

<sup>182</sup> *Weisenger v. Taylor*, 1 Bush (Ky.) 275, 276; *Vance v. Throckmorton*, 3 Bush (Ky.) 41; *Fuller v. Coats*, 18 Ohio St. 343.

<sup>183</sup> *Sneider v. Geiss*, 1 Yeates (Pa.) 34; *Houser v. Tully*, 62 Pa. St. 92.

<sup>184</sup> *Jalie v. Cardinal*, 35 Wis. 118; *Smith v. Wilson*, 36 Minn. 334, 31 N. W. 176.

<sup>185</sup> *Fuller v. Coats*, 18 Ohio St. 343; *Packard v. Northcraft*, 2 Metc. (Ky.) 439.

<sup>186</sup> *Fuller v. Coats*, *supra*.

guest. On this point, Mr. Schouler says:<sup>137</sup> "The right of mitigating this responsibility by special contract with the particular guest receives, thus far, but slight attention from our courts; yet, if analogies can serve us, they tend plainly to the conclusion that any innkeeper may make a qualified or limited acceptance of his guest's property, though not, in America at least, to the extent of divesting himself of all responsibility for the acts of servants, fellow lodgers, or others about the inn, nor certainly so as to excuse misconduct or the want of ordinary care on his own part."<sup>138</sup> An innkeeper cannot limit his liability by an implied contract, by the mere posting of a notice in the room which the guest occupies that the innkeeper will not be liable for the loss of goods unless certain regulations mentioned therein are complied with;<sup>139</sup> nor by a printed heading to the same effect on the register, even though the guest signs the register, unless his attention is called thereto, and he assents.<sup>140</sup>

*Same—Custom.*

Though it is sometimes said that an innkeeper's liability may be limited by custom,<sup>141</sup> yet this can only be true on the theory of an implied contract. Therefore a guest is not bound by a custom of which he was ignorant, for his assent cannot be presumed.<sup>142</sup>

*By Statute—Losses above Certain Amount.*

By statutes in a few states, the liability of innkeepers is limited to a certain amount,<sup>143</sup> or to such property as is usual and prudent

<sup>137</sup> Bailm. (2d Ed.) § 309.

<sup>138</sup> See post, p. 413.

<sup>139</sup> Bodwell v. Bragg, 29 Iowa, 232. And see Burbank v. Chapin, 140 Mass. 123, 2 N. E. 934.

<sup>140</sup> Bernstein v. Sweeny, 33 N. Y. Super. Ct. 271; Olson v. Crossman, 31 Minn. 222, 17 N. W. 375. And see Murchison v. Sergeant, 69 Ga. 206.

<sup>141</sup> Albin v. Presby, 8 N. H. 408.

<sup>142</sup> Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417. When the proprietor of an hotel employs a servant to receive and keep the property of guests while at meals, his liability for the default of this servant in the custody of property so received is not affected by the fact that he has also provided a check room for the safe-keeping of such property. Labold v. Southern Hotel Co., 54 Mo. App. 567.

<sup>143</sup> Massachusetts, Pub. St. 1882, c. 102, § 12; Stim. Am. St. Law, § 4392.

for a guest to retain on his person or in his room,<sup>144</sup> or to such goods as are needed by the guest for present use.<sup>145</sup>

*Same—Posting Notices.*

In most states it is now provided by statute that an innkeeper may avoid liability for the loss of goods not intrusted to his special care by posting notices, in the manner prescribed by the statutes, that he has a safe for the deposit of money and valuables and will not be responsible therefor unless they are deposited with him.<sup>146</sup> It is said that such statutes, being in derogation of the common law, are to be strictly construed.<sup>147</sup> The requirements of such statutes as to the posting of notice must be shown to have been complied with, or the innkeeper is not excused.<sup>148</sup> It has been held that actual notice to the guest is not sufficient, if the required notices have not been posted.<sup>149</sup> Under these statutes, an innkeeper

<sup>144</sup> Pennsylvania, Brightly, *Purd. Dig. tit. "Inns,"* 18; Illinois, *Cothran's Rev. St.* 1889, c. 71, §§ 1, 2; Michigan, *How. Ann. St.* 1882, § 2095; Iowa, *Miller's Rev. Code* 1880, c. 181, § 1; Nebraska, *Comp. St.* 1885, c. 39, § 1, 2; Delaware, 14 *Laws*, c. 417, § 1; Louisiana, *Rev. Civ. Code* 1882, art. 2968, *Stim. Am. St. Law*, § 4392.

<sup>145</sup> California, *Civ. Code*, § 6860; Dakota, *Civ. Code*, § 1063; New Hampshire, *Laws* 1885, c. 97; Massachusetts, *Pub. St.* 1885, c. 358; Maine, *Rev. St.* 1883, c. 27, § 7. *Stim. Am. St. Law*, § 4392.

<sup>146</sup> Rhode Island, *Pub. St.* 1882, c. 204, § 30. New York, *Laws* 1855, c. 421 § 1; Banks & Bros.' *Rev. St. (8th Ed.)* p. 1419. New Jersey, *Revision*, 1877, tit. "Inns," § 70. Pennsylvania, Brightly, *Purd. Dig. tit. "Inns,"* 18. Ohio, *Rev. St.* 1890, § 4427. Illinois, *Cothran's Rev. St.* 1889, c. 71, §§ 1, 2. Michigan, *How. Ann. St.* 1882, § 2095. Wisconsin, *Sanb. & B. Ann. St.* 1880, § 1725. Iowa, *McClain's Ann. St.* 1884, p. 610. Minnesota, *Gen. St.* 1878, c. 124, § 21; *Gen. St.* 1894, § 7997. Nebraska, *Comp. St.* 1885, c. 39, § 1, 2. Maryland, *Pub. Gen. Laws* 1888, p. 1032. Delaware, 14 *Laws*, c. 417, § 1. Kentucky, *St.* 1894, § 2176. Tennessee, *Mill. & V. Code* 1884, § 2787. California, *Civ. Code*, § 6860. Dakota, *Civ. Code*, § 1063. Georgia, *Code* 1882, § 2119. Louisiana, *Rev. Civ. Code* 1882, art. 2968. Alabama, *Civ. Code* 1885, §§ 1327, 1328. 1 *Stim. Am. St. Law*, § 4392.

<sup>147</sup> *Ramaley v. Leland*, 43 N. Y. 539; *Lanier v. Youngblood*, 73 Ala. 587.

<sup>148</sup> *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114; *Olson v. Crossman*, 31 Minn. 222, 17 N. W. 375; *Lanier v. Youngblood*, 73 Ala. 587; *Beale v. Posey*, 72 Ala. 323; *Spice v. Bacon*, 36 Law T. (N. S.) 896.

<sup>149</sup> *Batterson v. Vogel*, 8 Mo. App. 24; *Lanier v. Youngblood*, 73 Ala. 587. *Contra*, *Purvis v. Coleman*, 21 N. Y. 111. Cf. *Shultz v. Wall*, 134 Pa. St. 262, 19 Atl. 742.

is still liable for the goods of his guests not deposited as required by properly posted notices, where the loss is due to the fault of the innkeeper or of his servants.<sup>150</sup>

In most states, certain property particularly valuable in itself, taking but small space, compared with its value, for its safe-keeping, easy of concealment and removal, holding out great temptation to the dishonest, and not necessary to the comfort or convenience of the guest while in his room, is made the subject of the statutory exemption. Property of a different description, including that which is useful or necessary to the comfort and convenience of the guest, that which is usually carried and worn as a part of the ordinary apparel and outfit, or is ordinarily used and is convenient for use by travelers, as well in as out of their rooms, is left, as before the statute, at the risk of the innkeeper.<sup>151</sup> Thus, such articles as apparel worn at the time, and watch, and pocket money, are not expected to be delivered to the innkeeper for safe-keeping, and the retention of them in the guest's room is in accord with the purpose of the statute. In respect to such articles, therefore, thus kept, the innkeeper is responsible.<sup>152</sup> The reasons for such a holding are stated in a Georgia case by Chief Justice Jackson, as follows: "Is the guest to deposit his valise there, and go or send after it to get out a clean shirt to put on? Is he to leave his coat there, go to his room in his shirt sleeves, or send it down and get a check for it after he goes to bed? Is he to deposit there his watch and pocket change, and get a check for them? The whole regulation, if meant for guests in their rooms, is on its face not only unreasonable, but absurd."<sup>153</sup> In some states, however, under statutes differently worded, no such exceptions are admitted, and the courts hold the intention of the legislators to have been to require a guest to deposit his watch, and even money required by his daily expenses, if he wishes to hold the innkeeper liable.<sup>154</sup> These statutes limiting an innkeeper's lia-

<sup>150</sup> See the statutes cited above, note 146. *Beale v. Posey*, 72 Ala. 323, 331.

<sup>151</sup> *Ramaley v. Leland*, 43 N. Y. 539.

<sup>152</sup> *Weisenger v. Taylor*, 1 Bush (Ky.) 275; *Krohn v. Sweeney*, 2 Daly (N. Y.) 200; *Noble v. Milliken*, 74 Me. 225; *Maltby v. Chapman*, 25 Md. 310.

<sup>153</sup> *Murchison v. Sergeant*, 69 Ga. 206, 211.

<sup>154</sup> *Ramaley v. Leland*, 43 N. Y. 539; *Hyatt v. Taylor*, 42 N. Y. 258; *Stewart v. Parsons*, 24 Wis. 241.



bility have no reference to losses at the inn occurring before the guest has an opportunity to make a deposit of his property, or after he has packed his trunk and given notice for immediate departure, etc., or delivered up the key of his room to the clerk to have his trunk brought down.<sup>155</sup>

#### SAME—INNKEEPER'S LIEN.

**57. An innkeeper has a lien, to secure his compensation, on all property within the inn which belongs to the guest.**

Compelled to afford entertainment to whomsoever may apply, the law, as an indemnity for the extraordinary liabilities which it imposes, has clothed the innkeeper with extraordinary privileges. It gives him, as a security for unpaid charges, a lien upon the property of his guest.<sup>156</sup> It was once held that he might detain the person of his guest, but that doctrine is now exploded. An innkeeper cannot detain the person of his guest, or take off his clothes, in order to secure payment of his bill.<sup>157</sup> The lien covers all the property belonging to the guest which he brings to the inn. Even property which is exempt from execution is subject to an innkeeper's lien. On this last question it was said, in an Iowa case:<sup>158</sup> "An innkeeper's lien exists by common law, and we see nothing in the statute exempting certain property from execution to indicate an intention to abrogate the common law in this respect. The statute exempts only from general execution. It was never designed to prevent persons from giving a lien upon whatever property they see fit. Where a lien is given, it may, of course, be enforced. Had the plaintiff given a chattel mortgage upon his coat to secure his hotel bill, no one would doubt the right of the defendant to foreclose it, notwithstanding the coat might have been a part of the plaintiff's ordinary wearing apparel. When the plain-

<sup>155</sup> *Rosenplaenter v. Roessle*, 54 N. Y. 262.

<sup>156</sup> *Murray v. Marshall*, 9 Colo. 482, 13 Pac. 539; *Manning v. Hollenbeck*, 27 Wis. 202; *Cook v. Kane*, 13 Or. 482, 11 Pac. 220.

<sup>157</sup> *Sumbolf v. Alford*, 3 Mees. & W. 248.

<sup>158</sup> *Swan v. Bourne*, 47 Iowa, 501.

tiff became defendant's guest at his hotel, he gave the defendant a lien upon his coat as effectually as if he had given him a mortgage upon it. The law implied that, from the act of becoming the defendant's guest, and taking his coat from him."

*Goods not Owned by Guest.*

It is stated by most of the text writers that an innkeeper has a lien on goods brought to his house by a guest, even though the guest is not the owner.<sup>159</sup> An exception is admitted when the innkeeper knew that the guest was not the owner. In such case he is denied a lien.<sup>160</sup> When the cases relied upon to support the general proposition that an innkeeper has a lien upon the goods of a third person are examined, it is found that, in some of them, a lien has been allowed for specific services upon the chattel on which the lien is claimed. For instance, an innkeeper has been allowed a lien on a horse for his keep,<sup>161</sup> and on other chattels for their storage.<sup>162</sup> In the remaining American cases there is a direct conflict. In Pennsylvania it has been held that an innkeeper has no lien on a stolen horse left with him, even for the animal's care;<sup>163</sup> and, under the Missouri statute, an innkeeper has been denied a lien on a typewriter which was not the property of the guest.<sup>164</sup> On the other hand, in *Cook v. Kane* <sup>165</sup> it was held that an innkeeper had a lien on a piano which did not belong to the guest. This doctrine has been assumed in some other cases, without much consideration.<sup>166</sup> The rule seems to be firmly estab-

<sup>159</sup> Schouler, *Bailm.* (2d Ed.) § 326; Edwards, *Bailm.* (3d Ed.) §§ 474, 475.

<sup>160</sup> *Broadwood v. Granara*, 10 Exch. 417. And see *Johnson v. Hill*, 3 Starkie, 172.

<sup>161</sup> *Robinson v. Walter*, Poph. 127.

<sup>162</sup> *Domestic Sewing Mach. Co. v. Watters*, 50 Ga. 573 (under a statute); *Turrell v. Crawley*, 18 Law J. Q. B. 155; s. c., 13 Q. B. 197.

<sup>163</sup> *Gump v. Showalter*, 43 Pa. St. 507. And see *Johnson v. Hill*, 3 Starkie, 172; *Turrell v. Crawley*, 18 Law J. Q. B. 155; s. c., 13 Q. B. 197.

<sup>164</sup> *Wyckoff v. Southern Hotel Co.*, 24 Mo. App. 382. In the opinion, Thompson, J., though he admits a contrary rule at common law, criticises it in strong terms.

<sup>165</sup> 13 Or. 482, 11 Pac. 226. See the dissenting opinion of Thayer, J.

<sup>166</sup> *Singer Manuf'g Co. v. Miller* (Minn.) 55 N. W. 56; *Manning v. Hollenbeck*, 27 Wis. 202; *Covington v. Newberger*, 99 N. C. 523. And see, as to a boarding-house keeper, *Jones v. Morrill*, 42 Barb. 623.

lished in England,<sup>167</sup> but not by any case before the Revolution.<sup>168</sup> Still, it is not believed that the authority of these cases should be sufficient to establish in this country a rule so contrary to all the analogies of our law. In no other case is it possible to create a lien on chattels without the consent of the owner, unless he has clothed the one in possession with the indicia of title, or in some other way made it possible for him to defraud third persons. An innkeeper has been denied a lien on a horse, received from one not shown to be a guest, for his charges for the care of the horse.<sup>169</sup> So, a lien has been denied on a wife's separate property for her husband's board bill.<sup>170</sup>

*For What Charges.*

An innkeeper's lien covers charges for extras, such as wines furnished a guest, as well as the amounts due for board and lodging.<sup>171</sup> The lien is a general one, so that each article belonging to the guest is liable for the whole amount due. That is, there is a lien on a guest's horse, not only for the charges incurred for the horse itself, but for the board, etc., of the guest, as well.<sup>172</sup> An innkeeper has a lien for entertainment furnished an infant, when such entertainment is a necessary for the infant.<sup>173</sup>

### SAME—WAIVER OF LIEN.

#### 58. An innkeeper's lien is waived by voluntarily parting with possession.

As a lien exists only by virtue of possession, when an innkeeper permits a guest to take his goods away the lien is gone. To com

<sup>167</sup> Threfall v. Borwick, L. R. 10 Q. B. 210, affirming L. R. 7 Q. B. 711; Snead v. Watkins, 1 C. B. (N. S.) 267; Mulliner v. Florence, 3 Q. B. Div. 484; Robins v. Gray [1895] Q. B. 78.

<sup>168</sup> In Robinson v. Walter, Poph. 127, the lien was for the care of the horse on which the lien was allowed.

<sup>169</sup> Fox v. McGregor, 11 Barb. 41; Grinnell v. Cook, 3 Hill. 485; Burns v. Pigot, 9 Car. & P. 208; Elliott v. Martin (Mich.) 63 N. W. 525.

<sup>170</sup> McIlvane v. Hilton, 7 Hun. 594.

<sup>171</sup> Proctor v. Nicholson, 7 Car. & P. 67.

<sup>172</sup> Mulliner v. Florence, L. R. 3 Q. B. Div. 484. But see Domestic Sewing Mach. Co. v. Watters, 50 Ga. 573.

<sup>173</sup> Watson v. Cross, 2 Duv. (Ky.) 147.

plete the right of lien, it is essential that the possession and right of possession of the goods be continued and uninterrupted. A relinquishment of the possession of property, by the party in whose favor a lien or pledge exists, to the general owner, is an abandonment, and operates as an immediate release or waiver of the lien.<sup>174</sup> A lien may perhaps be renewed by the return and restitution of the property; but in such case it will be subordinate to any intervening incumbrance to which the property in the meantime has become subject.<sup>175</sup> It may well be that if the innkeeper, without any fraud being practiced upon him, accepts a draft or check drawn by his guest in payment of his bill, and voluntarily relinquishes the possession of the baggage or goods, his right to a lien is gone. But where the innkeeper is induced to part with the possession of the property through false and fraudulent representations made by the guest, he does not thereby waive his lien. It is then on principle analogous to the case where a vendor is induced to part with his goods through the fraud of the vendee; the defendant purchaser, or any one claiming under him, not being a bona fide purchaser for value.<sup>176</sup> Taking security for the payment of a guest's bill is not a waiver of the innkeeper's lien, unless there is an agreement, express or implied, to do so.<sup>177</sup> The lien is extinguished by a tender.<sup>178</sup> When there is an agreement to give credit, no lien arises.<sup>179</sup>

#### SAME—ENFORCEMENT OF LIEN.

**59. At common law an innkeeper's lien gives no right to sell, but statutes in several states now give such power.**

<sup>174</sup> *Hickman v. Thomas*, 16 Ala. 666.

<sup>175</sup> *Perkins v. Boardman*, 14 Gray, 481. But see *Grinnell v. Cook*, 3 Hill, 485.

<sup>176</sup> *Manning v. Hollenbeck*, 27 Wis. 202.

<sup>177</sup> *Angus v. McLachlan*, L. R. 23 Ch. Div. 330.

<sup>178</sup> *Gordon v. Cox*, 7 Car. & P. 172. And see *Allen v. Smith*, 12 C. B. (N. S.) 644, where it is said that an innkeeper, by demanding more than is due, makes a tender unnecessary.

<sup>179</sup> *Jones v. Thurloe*, 8 Mod. 172. Where an innkeeper owes his guest for labor more than she owes for board, he has no lien upon her trunk. *Hanlin v. Walters*, 3 Colo. App. 519, 34 Pac. 686.

The security afforded an innkeeper for his compensation, by giving him a lien on his guest's goods, carries with it no power to sell the goods.<sup>180</sup> At common law his only remedy is by an action to foreclose the lien.<sup>181</sup> In a number of states it is now provided by statute that the innkeeper may sell under his lien.<sup>182</sup>

#### TERMINATION OF RELATION.

**60.** The relation of innkeeper and guest may be terminated—

- (a) By the innkeeper for the guest's misconduct or default in payment (p. 297).
- (b) By the guest at any time, by signifying an intention to do so (p. 297).

**61.** When the relation is terminated, the innkeeper's exceptional liability for the guest's goods is at an end, except

**EXCEPTION**—When the goods are left with the innkeeper with his consent, his liability continues for a reasonable time (p. 298).

An innkeeper may terminate his relation as such to his guest only for misconduct on the part of the guest,<sup>183</sup> or for the guest's failure to pay the innkeeper his reasonable charges.<sup>184</sup> The guest, however, can terminate the relation whenever he chooses. But if he does not notify the innkeeper of his intention to do so, he continues liable for any charges which accrue.<sup>185</sup> The temporary absence of a guest does not terminate the relation of guest and

<sup>180</sup> *Case v. Fogg*, 46 Mo. 44; *Fox v. McGregor*, 11 Barb. (N. Y.) 41, 43; *Jones v. Pearle*, 1 Strange, 556.

<sup>181</sup> *Fox v. McGregor*, 11 Barb. (N. Y.) 41, 43.

<sup>182</sup> *New York, Banks & Bros.' Rev. St. (8th Ed.)* p. 1420; *Pennsylvania, Brightly, Purd. Dig. tit. "Inns,"* 17; *Nevada, Gen. St. 1885, § 4960*; *Maine, Rev. St. 1883, c. 91, § 46*; *New Jersey, Revision 1709-1877, tit. "Inns,"* 68; *Virginia, Code 1887, § 2489*; *Utah, Comp. Laws 1888, § 2955*; *Florida, McCl. Dig. 1881, c. 114, § 6*. 1 *Stim. Am. St. Law, § 4393*.

<sup>183</sup> *Com. v. Mitchel*, 2 Pars. Eq. Cas. (Pa.) 431; *Markham v. Brown*, 8 N. H. 523; *Howell v. Jackson*, 6 Car. & P. 723; *Morlarty v. Brooks*, 1d. 684.

<sup>184</sup> *Lawrence v. Howard*, 1 Utah, 142. See *Schouler, Bailm. (2d Ed.)* § 326.

<sup>185</sup> See *Miller v. Peeples*, 60 Miss. 819.



innkeeper.<sup>186</sup> But the relation of guest and innkeeper is terminated when the guest pays his bill and has his name stricken from the register of guests, for the purpose of freeing himself from liability as a guest, and he cannot thereafter, and while he is not a guest, claim the rights of one as to the baggage he left behind him.<sup>187</sup> The expectation thereafter to become a guest did not continue the relation, terminated at his instance, and for his advantage, by settling his account for entertainment. An innkeeper is chargeable as such because of the profit derivable from entertaining. The right to charge is the criterion of the innkeeper's liability. When the liability of the guest to be charged as such ceases, his claim on the innkeeper as such expires, subject only to the right to hold him responsible for the baggage of the guest for such time as may be reasonable to effect a removal, to be determined by circumstances.<sup>188</sup>

*Liability after relation is terminated.*

It is said, generally, that after the relation of guest ceases the innkeeper appears liable only as an ordinary bailee, gratuitous or otherwise, for the inanimate goods his departing guest may have left in his care, unless strict proof be furnished of a different understanding.<sup>189</sup> Mr. Wharton, in his work on the Law of Negli-

<sup>186</sup> *Towson v. Havre de Grace Bank*, 6 Har. & J. (Md.) 47; *Whitemore v. Haroldson*, 2 Lea (Tenn.) 312; *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560; *Allen v. Smith*, 12 C. B. (N. S.) 638. One does not cease to be a guest of an innkeeper by going out to dine or lodge with a friend, or by any other temporary absence. *Grinnell v. Cook*, 3 Hill (N. Y.) 485. Where a person takes a room at an inn and leaves his effects there, and makes the inn his principal abiding place, he does not cease to be a guest merely because he is occasionally absent from the inn and sometimes takes his meals elsewhere. *McDaniels v. Robinson*, 26 Vt. 316, 28 Vt. 387.

<sup>187</sup> *Miller v. Peeples*, 60 Miss. 819. Where a guest, on leaving an hotel, without the intention of returning as a guest, but without paying his bill, leaves his valise in the charge of the clerk, and returns within 48 hours, the innkeeper is liable as a bailee for want of ordinary care, and the loss of the valise raises a presumption of negligence against him. *Murray v. Marshall*, 9 Colo. 482, 13 Pac. 589.

<sup>188</sup> *Miller v. Peeples*, 60 Miss. 819; *Maxwell v. Gerard*, 84 Hun, 537, 32 N. Y. Supp. 849. By leaving a horse with an innkeeper after the guest has departed, the relation of innkeeper and guest is not continued so as to render the former liable as such for a sum of money left with him by the latter while stopping at his house. *McDaniels v. Robinson*, 28 Vt. 387.

<sup>189</sup> *Murray v. Clarke*, 2 Daly, 102; *Adams v. Clem*, 41 Ga. 65.

gence,<sup>190</sup> says: "It is an interesting question how long, when a guest leaves his baggage with an innkeeper, the innkeeper is liable as innkeeper for such. Judging from the analogy obtaining as to common carriers, we would conclude that the exceptional and onerous insurance liability of the innkeeper would not continue after the guest had permanently left the inn, allowing, of course, for a few hours which may be necessary for porters to effect a removal."<sup>191</sup> Thus, if a guest, intending to leave the hotel, intrusts his baggage to a porter of the hotel, whose duty it is to deliver the baggage at the depot, the relation is continued until the delivery at the designated place.<sup>192</sup>

#### INNKEEPERS AS ORDINARY BAILEES.

62. An innkeeper may be an ordinary bailee of property in his charge. His liability is that

(a) Of an ordinary bailee for hire (p. 299).

(1) For goods of a guest kept for show or sale.

(2) For goods held under his lien for charges.

(3) For goods of boarders.

(b) Of a gratuitous bailee (p. 300).

(1) For goods left an unreasonable time by a departing guest.

(2) For goods deposited by one not a guest, to be kept without compensation.

#### *As Ordinary Bailees for Hire.*

An innkeeper may be a bailee of goods without being subject to the exceptional liability of an innkeeper as such. In such cases his rights and liabilities are measured by the rules applicable to the different classes of ordinary bailments. The cases most frequently arising have been enumerated in the black letter. It has already been seen<sup>193</sup> that the exceptional liability of an innkeeper does not attach to goods kept by a guest for show or sale. As to

<sup>190</sup> Section 687.

<sup>191</sup> *Murray v. Marshall*, 9 Colo. 482, 13 Pac. 589.

<sup>192</sup> *Glenn v. Jackson*, 93 Ala. 342, 9 South. 259; *Sasseen v. Clark*, 37 Ga. 242; *Dickenson v. Winchester*, 4 Cush. 114. And so, where baggage is taken to the wrong boat by the innkeeper's servant, and so lost. *Giles v. Fauntleroy*, 13 Md. 126.

<sup>193</sup> Ante, p. 287.

such goods the innkeeper is liable only as an ordinary bailee for hire, and bound to use ordinary diligence.<sup>194</sup> His liability is the same for goods which he holds under his lien,<sup>195</sup> and for the goods of those who reside at the inn as boarders rather than as guests.<sup>196</sup> *As Gratuitous Bailees.*

An innkeeper may be a mere gratuitous bailee, and as such bound to use only slight diligence. The most usual cases of this kind are where one who has been a guest leaves goods with the innkeeper for more than a reasonable length of time after his departure from the inn.<sup>197</sup> Another case in which an innkeeper becomes a gratuitous bailee arises when goods are left in his charge by one who does not become a guest at all, and no agreement is made that the innkeeper shall receive compensation for the care of the goods.<sup>198</sup>

<sup>194</sup> *Fisher v. Kelsey*, 121 U. S. 383, 7 Sup. Ct. 929; *Myers v. Cottrill*, 5 Biss. 465, Fed. Cas. No. 9,985; *Mowers v. Fethers*, 61 N. Y. 34; *Needles v. Howard*, 1 E. D. Smith, 54, 61; *Carter v. Hobbs*, 12 Mich. 52; *Neal v. Wilcox*, 4 Jones, Law (N. C.) 146.

<sup>195</sup> *Murray v. Marshall*, 9 Colo. 482, 13 Pac. 589; *Giles v. Fauntleroy*, 13 Md. 126; *Murray v. Clarke*, 2 Daly, 102.

<sup>196</sup> *Lawrence v. Howard*, 1 Utah, 143. And see *Mowers v. Fethers*, 61 N. Y. 34. So, as to person receiving entertainment at a ball. *Carter v. Hobbs*, 12 Mich. 52. And see ante, p. 265. An hotel keeper in whose safe a regular boarder deposits money for safe-keeping is, at most, a bailee for hire, and is not liable therefor where his night clerk steals the money from the safe, in the absence of any proof of want of ordinary care in employing him. *Taylor v. Downey* (Mich.) 62 N. W. 716. An innkeeper is not liable for loss of boarder's baggage and other valuables by fire, not shown to have been caused by the negligence of the innkeeper or his servants. *Moore v. Long Beach Development Co.*, 87 Cal. 483, 26 Pac. 92. He is not responsible, except as an ordinary bailee for hire, for the safe-keeping of a horse left in his stable for the night by one who is neither a lodger nor a guest, the stable having been consumed by fire, without negligence on his part. *Ingallsbee v. Wood*, 33 N. Y. 577. An innkeeper is not an insurer of the safety of baggage delivered to him to be held as a pledge for money loaned, or for accommodation, by a guest, after he has severed his personal connection with the hotel by surrendering his room and paying his bill. *Wear v. Gleason*, 52 Ark. 364, 12 S. W. 756.

<sup>197</sup> *Miller v. Peeples*, 60 Miss. 819; *O'Brien v. Vaill*, 22 Fla. 627, 1 South. 137; *Whitemore v. Haroldson*, 2 Lea (Tenn.) 312. But see *Murray v. Marshall*, 9 Colo. 482, 13 Pac. 589; *Adams v. Clem*, 41 Ga. 65.

<sup>198</sup> *Wiser v. Chesley*, 53 Mo. 547; *Stewart v. Head*, 70 Ga. 449; *Lawrence v. Howard*, 1 Utah, 142.

*End for big quiz.*  
*Nov 30, 1901.*

## CHAPTER VII.

## CARRIERS OF GOODS.

- 63-64. Private Carriers.
- 65. Common Carriers.
- 66. Essential Characteristics.
- 67-68. When Liability Attaches.
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- 70-75. Duty to Carry for All.
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- 77. Right to Compensation.
- 78. Discrimination.
- 79. Lien.
- 80. Liability for Loss or Damage.
- 81-82. As Insurers.
- 83. Carriers of Live Stock.
- 84. Carriers of Baggage.
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- 86-87. Liability for Delay.
- 88. Special Property of Carrier—Right of Action.
- 89. Special Contract.
- 90-91. Contracts Limiting Liability.
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- 95. Termination of Liability as Common Carrier.
- 96. Delivery to Consignee.
- 97. Delivery to Connecting Carrier.
- 98. Excuses for Nondelivery.
- 99-100. Post-Office Department.

## PRIVATE CARRIERS.

- 63. A private carrier is one who, without being engaged in such business as a public employment, undertakes to transport and deliver goods in a particular instance.
- 64. Private carriers may be either—
  - (a) Without hire (p. 302), or
  - (b) For hire (p. 302).

*Carriers without Hire.*

Every one who transports another's goods from place to place without actual or contemplated reward is a private carrier.<sup>1</sup> As will be seen, compensation for the carriage is always essential, to constitute one a common carrier.<sup>2</sup> A bailment for gratuitous carriage is simply a mandate. The carrier is a mandatary, and, as such, the rights and liabilities of the parties have already been sufficiently considered in the chapter on "Bailments for the Sole Benefit of the Bailor."<sup>3</sup>

*Private Carriers for Hire.*

"Private carriers for hire are such as make no public profession that they will carry for all who apply, but who occasionally, or upon the particular occasion, undertake, for compensation, to carry the goods of others upon such terms as may be agreed upon."<sup>4</sup> Where goods are carried by a private carrier for a compensation, the bailment is, in all respects, a hiring of labor and services about a chattel. In the Roman terminology, such bailments are called "locatio mercium operis vehendarum." All the principles discussed in relation to hired services in the chapter on "Hiring" are equally applicable here.<sup>5</sup>

*Same—Liability for Negligence.*

As in other cases of bailments for hired services, a private carrier for hire must exercise reasonable diligence in the performance of his undertaking.<sup>6</sup> He must exercise such care and diligence as a reasonably prudent man would exercise in the conduct of his own business, or in the preservation of his own property.<sup>7</sup> He is liable for ordinary neglect.<sup>8</sup> What is due care must be determined.

<sup>1</sup> Hutch. Carr. § 16.

<sup>2</sup> See post, p. 303.

<sup>3</sup> See ante, p. 40.

<sup>4</sup> Hutch. Carr. § 35. And see *Pennewill v. Cullen*, 5 Har. (Del.) 238.

<sup>5</sup> See ante, p. 212.

<sup>6</sup> Story, Bailm. § 399; Ang. Carr. § 47; *Ames v. Belden*, 17 Barb. 513, 517; *Samms v. Stewart*, 20 Ohio, 70, 73.

<sup>7</sup> U. S. v. Power, 6 Mont. 271, 273, 12 Pac. 639.

<sup>8</sup> *White v. Bascom*, 28 Vt. 268; *Varble v. Bigley*, 14 Bush (Ky.) 698; *Pennewill v. Cullen*, 5 Har. (Del.) 238; *Forsythe v. Walker*, 9 Pa. St. 148; *Baird v.*



as has been repeatedly stated, with a view to all the circumstances. Just here lies the most essential distinction between private and common carriers. Private carriers are liable only for bad faith or negligence, while ordinarily, as will be seen, the presence or absence of negligence is wholly immaterial in actions to charge common carriers with liability for a loss or damage to goods intrusted to them.<sup>9</sup> So, also, private carriers may stipulate against liability for negligence;<sup>10</sup> common carriers cannot.<sup>11</sup>

*Same—Theft or Robbery.*

Likewise, private carriers are not liable for losses caused by theft or robbery unless their negligence contributed to the loss, while common carriers are liable irrespective of negligence.<sup>12</sup>

*Same—Lien.*

It would seem that private carriers ought to have a lien on the goods carried for their compensation. But the point is not settled. It is true that the carriage may not have conferred any additional value upon the goods, upon which ground a bailee's lien is usually rested; but neither does a warehouseman, whose lien is conceded. Most text writers agree that a private carrier should have a lien for his charges.<sup>13</sup>

Daly, 57 N. Y. 236, 246; Bush v. Miller, 13 Barb. 481, 488; Stannard v. Prince, 64 N. Y. 300; Roberts v. Turner, 12 Johns. 232; Platt v. Hibbard, 7 Cow. 497; Brown v. Denison, 2 Wend. 593; Holtzelaw v. Duff, 27 Mo. 392; Beck v. Evans, 16 East, 244. See ante, p. 235.

<sup>9</sup> See post, p. 401.

<sup>10</sup> Wells v. Steam Nav. Co., 2 N. Y. 204; Alexander v. Greene, 3 Hill, 9; Hutch. Carr. § 40. See ante, p. 27.

<sup>11</sup> See post, p. 413.

<sup>12</sup> See post, p. 401.

<sup>13</sup> "Upon general principles, there seems to be no reason why a private carrier should not have a lien for performing services similar to those rendered by a public carrier." 1 Jones, Liens, § 276. See Riddle v. Railroad Co., 1 Inter St. Commerce Com. R. 594, 604. Mr. Hutchinson (Carriers, § 46) cites Fuller v. Bradley, 25 Pa. St. 120, as denying a private carrier a lien, but the case does not sustain that view. In that case the defendant had hired to plaintiff his boat and his services for a certain trip, and had put himself and vessel under the latter's control. He was to be paid by the day. It is clear he was not a bailee at all, but simply a servant.

## COMMON CARRIERS.

65. A common carrier is one who undertakes, in the exercise of a public calling, to carry goods, for hire, for whomsoever may employ him.

## SAME—ESSENTIAL CHARACTERISTICS.

66. The following are the essential characteristics of a common carrier:

- (a) The employment must be public and habitual, and not merely casual or occasional (p. 304).
- (b) An action must lie for a refusal to carry (p. 308).
- (c) The carriage must be for a consideration (p. 308).

*Public and Habitual Employment.*

A "common carrier" was defined in *Gisbourn v. Hurst*<sup>14</sup> to be "any man undertaking, for hire, to carry the goods of all persons, indifferently," and in *Dwight v. Brewster*<sup>15</sup> to be "one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place." In *Orange Bank v. Brown*,<sup>16</sup> Chief Justice Savage said: "Every person who undertakes to carry, for a compensation, the goods of all persons, indifferently, is, as to the liability imposed, to be considered a common carrier." "The distinction between a common carrier and a private or special carrier is that the former holds himself out in common—that is, to all persons who choose to employ him—as ready to carry for hire, while the latter agrees, in some special case, with some private individual, to carry for hire."<sup>17</sup> The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. "On the whole," says Prof. Parsons, "it seems to be clear that no one can be considered as a common carrier unless he has in some way held himself out to the public as a carrier, in

<sup>14</sup> 1 Salk. 249.

<sup>16</sup> 1 Pick. 50, 53.

<sup>15</sup> 3 Wend. 158, 161.

<sup>17</sup> 2 Story, Cont. (5th Ed.) § 919.

such manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him.”<sup>18</sup> The chief test by which to determine whether one is a common carrier or not is to ascertain “whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons, indifferently, who send him goods to be carried.”<sup>19</sup> The test is not whether he is carrying as a public employment, or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons, indifferently, who send him goods to be carried.”<sup>10</sup> If he does so hold himself out, he is a common carrier. If he does not, he is not a common carrier. “The criterion is whether he carries for particular persons only, or whether he carries for every one.” If a man hold himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you or me only, that is a matter of special contract.”<sup>20</sup> This doctrine is supported by the overwhelming weight of authority, both in this country<sup>21</sup> and in England,<sup>22</sup> though a few American cases hold a

<sup>18</sup> 2 Pars. Cont. (8th Ed.) 175, note.

<sup>19</sup> Nugent v. Smith, 1 C. P. Div. 19, 423.

<sup>20</sup> Ingate v. Christie, 3 Car. & K. 61. See, also, 2 Kent, Comm. 598; Story, Bailm. § 495; Fish v. Chapman, 2 Ga. 349; Varble v. Bigley, 14 Bush (Ky.) 698; Schloss v. Wood, 11 Colo. 287, 17 Pac. 910.

<sup>21</sup> Fish v. Clark, 2 Lans. 176, 49 N. Y. 122; Allen v. Sackrider, 37 N. Y. 341; Fish v. Chapman, 2 Ga. 349; Piedmont Manuf'g Co. v. Columbia & G. R. Co., 19 S. C. 553; Bank of Orange v. Brown, 3 Wend. (N. Y.) 158, 161; Satterlee v. Groat, 1 Wend. 272; Chevallier v. Straham, 2 Tex. 115; Samms v. Stewart, 20 Ohio, 70; Harrison v. Roy, 39 Miss. 396; Mershon v. Hobensack, 22 N. J. Law, 372; Verner v. Sweitzer, 32 Pa. St. 208; McClures v. Hammond, 1 Bay (S. C.) 99; The Dan, 40 Fed. 691; Doty v. Strong, 1 Pin. (Wis.) 313. In Steele v. McTyre, 31 Ala. 667, it appeared that defendant built a flatboat and started down the river to Mobile, taking on cotton from several persons at their respective landings, and intending to sell the boat at Mobile. The boat struck a log in the river, and, in an action for the value of the cotton

<sup>22</sup> Coggs v. Bernard, 2 Ld. Raym. 909, 1 Smith, Lead. Cas. Eq. 283, and notes; Lane v. Cotton, 1 Ld. Raym. 646, 651; Forward v. Pittard, 1 Term R. 27; Nugent v. Smith, 1 C. P. Div. 19; Palmer v. Railway Co., 4 Mees. & W. 749; Riley v. Horne, 5 Bing. 217, 220.

contrary doctrine.<sup>23</sup> Within this rule, one who holds himself forth to the public to carry for hire is as much a common carrier on his first trip as on any subsequent one.<sup>24</sup> Nor is it necessary that one be engaged continuously or exclusively in the business of carriage.<sup>25</sup> If a farmer, at certain seasons of the year only, as when

lost, the court said: "If the appellants [the defendants] built or procured a flatboat, with which to carry cotton down the Cahauha river, and thence to Mobile, though only for a single trip, and held themselves out as ready and willing to carry cotton on their boat for the people generally who wished to send their cotton to Mobile, then they would be common carriers; and those who placed cotton upon the boat could not be affected by any private instructions which might have been given to the master of the boat as to the point on the river above which he was to take on no cotton. On the contrary, if the appellants did not hold themselves out as ready and willing to carry cotton for the public generally, to the extent of a proper load of the boat, or, in other words, did not constitute themselves the servants of the public in that business, but only proposed to take the cotton of some particular persons with whom engagements were made, they were not common carriers. If the appellants, having engaged a part of the loading for the boat, held themselves out as ready to carry for any person or persons to the extent of the remaining capacity of the boat, then they would be liable as common carriers to such persons as availed themselves of such offer of their services to the public generally as carriers. These questions, under the proof, should have been left to the jury."

<sup>23</sup> *Gordon v. Hutchinson*, 1 Watts & S. (Pa.) 285, 287; *Steinman v. Wilkies*, 7 Watts & S. (Pa.) 466, 468; *Moss v. Bettis*, 4 Heisk. (Tenn.) 661; post, p. 307.

<sup>24</sup> *Fuller v. Bradley*, 25 Pa. St. 120; *Steele v. McTyre*, 31 Ala. 667.

<sup>25</sup> *The Niagara v. Cordes*, 21 How. (U. S.) 7; *Dwight v. Brewster*, 1 Pick 50, 53. "It is true that common carriers undertake generally, and not as a casual occupation, and for all people indifferently; but, in order to make them such, it is not necessary that this should be their exclusive business, or that they should be continuously or regularly employed in it. They may combine it with another and several avocations, and yet be common carriers, subject to the extraordinary liabilities which have been imposed upon them in consequence of the public nature of their employment." *Moss v. Bettis*, 4 Heisk. (Tenn.) 661. All persons who transport goods from place to place for hire, for such persons as see fit to employ them, whether usually or occasionally, whether as a principal, or an incidental and subordinate, occupation, are common carriers, and incur all their responsibilities. *Chevallier v. Straham*, 2 Tex. 115. "The distinctive characteristic of a common carrier is that he transports goods for hire for the public generally, and it is immaterial wheth-

his crops are laid by, offers to carry for any one who will employ him, he is a common carrier while engaged in such carriage.<sup>26</sup> But if he should not offer to carry for all, but should make special contracts of carriage, he would be simply a private carrier.

*Same—Contra Cases.*

In *Gordon v. Hutchinson*<sup>27</sup> it was held that a wagoner carrying goods for hire is a common carrier, though that is not his principal business, but only an occasional and incidental employment. In that case it appeared that the defendant was a farmer, and was going to Bellefonte with a load, and applied to the plaintiff for the hauling of a load of goods for him on the return trip, and received an order to do so. A portion of the goods was lost, and the question arose whether the wagoner was liable as a common carrier, or only for negligence. The learned judge, in holding the defendant to be a common carrier, admitted that the rule was different in England, but thought that the English rule was not applicable to our situation. A similar rule has been established in Tennessee in regard to carriers by river craft,<sup>28</sup> but with respect to other carriers the general rule prevails in that state.<sup>29</sup> In no other states has the doctrine established in Pennsylvania been adopted.<sup>30</sup>

er this is his usual or occasional occupation, his principal or subordinate pursuit. \* \* \* There are no grounds, in reason, why the occasional carrier, who, periodically, in every recurring year, abandons his other pursuits, and assumes that of transporting goods for the public, should be exempted from any of the risks incurred by those who make the carrying business their constant or principal occupation. For the time being, he shares all the advantages arising from the business, and, as the extraordinary responsibilities of a common carrier are imposed by the policy, and not the justice, of the law, this policy should be uniform in its operation, imparting equal benefits, and inflicting the like burdens upon all who assume the capacity of public carriers, whether temporarily or permanently, periodically or continuously." *Id.*

<sup>26</sup> See *Moss v. Bettis*, 4 Heisk. (Tenn.) 661. Cf. *Fish v. Clark*, 2 Lans. 176, 49 N. Y. 122. And see *Steele v. McTyre*, 31 Ala. 667.

<sup>27</sup> 1 Watts & S. (Pa.) 285.

<sup>28</sup> *Moss v. Bettis*, 4 Heisk. (Tenn.) 661. Cf. *Steele v. McTyre*, 31 Ala. 667, citing, *inter alia*, *Craig v. Childress*, Peck (Tenn.) 270; *Johnson v. Friar*, 4 Yerg. 48; *Gordon v. Buchanan*, 5 Yerg. 71; *Turney v. Wilson*, 7 Yerg. 340. These cases are commented on in *Hutch. Carr.* § 52, note 2.

<sup>29</sup> *Walker v. Skipwith*, Meigs (Tenn.) 502, 504.

<sup>30</sup> *Hutch. Carr.* § 53.



*Action for Refusal to Carry.*

It follows as a corollary from the proposition that the business of carrying goods must be public and habitual, to render one a common carrier, that an action must lie against a common carrier for an unreasonable refusal to receive and transport goods tendered him for carriage.<sup>81</sup> Indeed, this is frequently proposed as the best test of whether one is a common carrier or not. Thus, in *Fish v. Chapman*<sup>82</sup> it is said: "One of the obligations of a common carrier, as we have seen, is to carry the goods of any person offering to pay his hire. With certain specific limitations, this is the rule. If he refuse to carry, he is liable to be sued, and to respond in damages to the person aggrieved; and this is, perhaps, the safest test of his character."<sup>83</sup>

*Carriage must be for Hire.*

To render one a common carrier, it is essential that the carriage should have been undertaken for a consideration.<sup>84</sup> Where no consideration is paid in a particular case for the carriage of goods, the carrier, though regularly engaged in the business of carrying goods for hire for the public generally, is not, in that particular case, a common carrier. Justice Story said:<sup>85</sup> "I take it to be exceedingly clear that no person is a common carrier, in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a 'common carrier,' in all our books, fully establishes this result. If no hire or recompense is payable ex debito justitiæ, but something is bestowed as a mere gratuity or

<sup>81</sup> *Nugent v. Smith*, 1 C. P. Div. 19; *Doty v. Strong*, 1 Pin. (Wis.) 313; *Wheeler v. Railroad Co.*, 31 Cal. 46; *Piedmont Manuf'g Co. v. Columbia & G. R. Co.*, 19 S. C. 353; *Maybin v. Railroad Co.*, 8 Rich. Law (S. C.) 240; *Ayres v. Railway Co.*, 71 Wis. 372, 37 N. W. 432; *Avinger v. Railway Co.* (S. C.) 7 S. E. 493.

<sup>82</sup> 2 Ga. 349, 354.

<sup>83</sup> If the charter of a corporation required it to carry for all who offered, the corporation would be, ipso facto, a common carrier; but, in the case of an individual, it is necessary to ascertain, first, whether he is a common carrier, before we can say whether or not he is liable for refusal to carry.

<sup>84</sup> *Littlejohn v. Jones*, 2 McM. (S. C.) 365, 366; *Self v. Dunn*, 42 Ga. 523.

<sup>85</sup> *Citizens' Bank v. Nantucket Steam-Boat Co.*, 2 Story, 16, Fed. Cas. No. 2,730.

voluntary gift, then, although the party may transport either persons or property, he is not, in the sense of the law, a common carrier, but he is a mere mandatary or gratuitous bailee; and, of course, his rights, duties, and liabilities are of a very different nature and character from those of a common carrier.<sup>36</sup> \* \* \* I agree that it is not necessary that the compensation should be a fixed sum, or known as 'freight'; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a quantum meruit, to or for the benefit of the company. And I further agree that it is by no means necessary that, if a hire or freight is to be paid, the goods or merchandise or money or other property should be entered upon any freight list, or the contract be verified by any written memorandum. But the existence or nonexistence of such circumstances may nevertheless be very important ingredients in ascertaining what the true understanding of the parties is, as to the character of the bailment." But the compensation need not be direct.<sup>37</sup> If the carriage is incident to some other service, for which compensation is paid or to be paid, no separate or special compensation is necessary.

"The price paid by the passenger for his fare, with liberty, at his discretion, to carry with him a certain amount of baggage, is, in effect, a gross average sum paid for the transportation of himself and of the ordinary weight of baggage. As the baggage is thus transported by a common carrier, and for a compensation, whether paid distinctly on that account or not, the general principle of this title of our law of bailment makes him liable for all losses not arising from the act of God or the public enemy."<sup>38</sup> But a carrier of passengers is not liable as a common carrier for the baggage of a gratuitous passenger.<sup>39</sup> Where a carrier, in consideration of re-

<sup>36</sup> See ante, p. 40.

<sup>37</sup> Hutch. Carr. § 57.

<sup>38</sup> Powell v. Myers, 26 Wend. 591, 596. And see Hollister v. Nowlen, 19 Wend. 234; Cole v. Goodwin, Id. 251; Bomar v. Maxwell, 9 Humph. 621; Hawkins v. Hoffman, 6 Hill, 586; Brooke v. Pickwick, 4 Bing. 218; McGill v. Rowand, 3 Pa. St. 451. But see Middleton v. Fowler, 1 Salk. 282; Upshare v. Aidel, 1 Comyn, 25.

<sup>39</sup> Flint & P. M. Ry. Co. v. Weir, 37 Mich. 111.

ceiving grain to carry, agrees to return the empty sacks without charge, he is nevertheless a common carrier of the empty sacks.<sup>40</sup>

*Who have been Held Common Carriers.*

There is no essential distinction in principle between carriers by land and carriers by water.<sup>41</sup> The following have been held to be common carriers: Express companies;<sup>42</sup> transportation companies;<sup>43</sup> canal companies;<sup>44</sup> stage coaches and omnibuses, as to baggage carried;<sup>45</sup> hackmen and cab drivers;<sup>46</sup> railroad companies,

<sup>40</sup> *Pierce v. Railway Co.*, 23 Wis. 387. See, also, *Spears v. Railroad Co.*, 67 Barb. 513. Where a carrier undertakes to transport and sell goods, and return the money, the return of the money is not gratuitous. *Harrington v. McShane*, 2 Watts, 443.

<sup>41</sup> *Nugent v. Smith*, 1 C. P. Div. 423; *Hale v. Navigation Co.*, 15 Conn. 539; *Trent & M. Nav. Co. v. Wood*, 4 Doug. 287, 3 Esp. 127; *Rich v. Kneeland*, Cro. Jac. 330, Hob. 17; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469.

<sup>42</sup> *United States Exp. Co. v. Backman*, 28 Ohio St 144; *Buckland v. Adams Exp. Co.*, 97 Mass. 124; *Lowell Wire Fence Co. v. Sargent*, 8 Allen. 189; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Sweet v. Barney*, 23 N. Y. 335; *American Exp. Co. v. Hockett*, 30 Ind. 250; *Gulliver v. Adams Exp. Co.*, 38 Ill. 503; *Verner v. Sweitzer*, 32 Pa. St. 208; *Christenson v. American Exp. Co.*, 15 Minn. 270 (Gil. 208); *Sherman v. Wells*, 28 Barb. 403; *Baldwin v. American Exp. Co.*, 23 Ill. 197; *Southern Exp. Co. v. Newby*, 36 Ga. 635; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185. See *Roberts v. Turner*, 12 Johns. 232; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11.

<sup>43</sup> *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392, 6 S. W. 881. But a mere forwarding agent is not a common carrier. *Roberts v. Turner*, 12 Johns. 232.

<sup>44</sup> *Miller v. Navigation Co.*, 10 N. Y. 431; *Hyde v. Navigation Co.*, 5 Term R. 389.

<sup>45</sup> *Story, Bailm.* §§ 496, 499; *Verner v. Sweitzer*, 32 Pa. St. 208. Hackney coach, *Bonce v. Railway Co.*, 53 Iowa, 278, 5 N. W. 177. Omnibus, *Parmelee v. Lowitz*, 74 Ill. 116, *Dibble v. Brown*, 12 Ga. 217; *Parmelee v. McNulty*, 19 Ill. 556. Cabs, drays, etc., see *Story, Bailm.* § 496; *Richards v. Westcott*, 2 Bosw. (N. Y.) 589; *Verner v. Sweitzer*, 32 Pa. St. 208; *Powers v. Davenport*, 7 Blackf. (Ind.) 497; *McHenry v. Railroad Co.*, 4 Har. (Del.) 448. In *Robertson v. Kennedy*, 2 Dana (Ky.) 431, the court said: "Every one who pursues the business of transporting goods for hire for the public generally is a common carrier. \* \* \* Draymen, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one part

<sup>46</sup> *Lemon v. Chanslor*, 68 Mo. 340; *Bonce v. Railway Co.*, 53 Iowa, 278, 5 N. W. 177.

as to baggage<sup>47</sup> and freight,<sup>48</sup> but not as to passengers;<sup>49</sup> hoy-men, bargemen, lightermen, canalboatmen;<sup>51</sup> ferries;<sup>52</sup> rafts or flatboats;<sup>53</sup> steamboats and merchant ships;<sup>54</sup> railroad receiv-

of a town to another, come within the definition. So, also, does the driver of a slide with an ox team. The mode of transporting is immaterial." See, also, *Ingate v. Christie*, 3 Car. & K. 61; *Sales v. Stage Co.*, 4 Iowa, 547; *Hollister v. Nowlen*, 19 Wend. 234; *Walker v. Skipwith*, Meigs (Tenn.) 502; *Frink v. Coe*, 4 G. Greene (Iowa) 555; *Powell v. Mills*, 30 Miss. 231. But see *Brind v. Dale*, 8 Car. & P. 207; *Moses v. Railroad*, 24 N. H. 71; *Charles v. Lasher*, 20 Ill. App. 36.

<sup>47</sup> *Macrow v. Railway Co.*, L. R. 6 Q. B. 612; *Hannibal R. Co. v. Swift*, 12 Wall. 262.

<sup>48</sup> *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray, 263; *Thomas v. Railroad Corp.*, 10 Metc. (Mass.) 472; *Root v. Railroad Co.*, 45 N. Y. 524; *Fuller v. Railroad Co.*, 21 Conn. 557, 570; *Rogers Locomotive & Machine Works v. Erie Ry. Co.*, 20 N. J. Eq. 379; *Noyes v. Railroad Co.*, 27 Vt. 110; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323. Railway companies are, perhaps, the most common instances of common carriers, and it would be useless to multiply citations.

<sup>49</sup> 1 Smith, Lead. Cas. § 234; *Aston v. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Camp. 79; *Sharp v. Grey*, 9 Bing. 457, 459; *Great Western Ry. Co. v. Blake*, 7 Hurl. & N. 987; *Hutch. Carr.* § 80. But see *Bretherton v. Wood*, 3 Brod. & B. 54; *Carpue v. Railway Co.*, 5 Q. B. Div. 747. Carriers of passengers, generally, are common carriers as to baggage of the passenger, but not as to his person. *Hollister v. Nowlen*, 19 Wend. 234; *Christie v. Griggs*, 2 Camp. 79; *Boyce v. Anderson*, 2 Pet. 150. As to what is baggage, see post, p. 381.

<sup>51</sup> *Bowman v. Teall*, 23 Wend. 306, 309; *Parsons v. Hardy*, 14 Wend. 215; *De Mott v. Laraway*, Id. 225. Compare *Fish v. Clark*, 49 N. Y. 122. See, also, *Humphreys v. Reed*, 6 Whart. (Pa.) 435; *Fuller v. Bradley*, 25 Pa. St. 120; *Hutch. Carr.* § 58a; *Arnold v. Halenbake*, 5 Wend. 33; *Hyde v. Navigation Co.*, 5 Term R. 389; *Trent Nav. Co. v. Ward*, 3 Esp. 127.

<sup>52</sup> *Wyckoff v. Ferry Co.*, 52 N. Y. 32; *Le Barror v. Ferry Co.*, 11 Allen, 312; *Lewis v. Smith*, 107 Mass. 334; *White v. Winnisimmet Co.*, 7 Cush. 156; *Fisher v. Clisbee*, 12 Ill. 344; *Pomeroy v. Donaldson*, 5 Mo. 36; *Whitmore v. Bowman*, 4 G. Greene (Iowa) 148; *Miller v. Pendleton*, 8 Gray, 547; *Claypool v. McAllister*, 20 Ill. 504; *Sanders v. Young*, 1 Head (Tenn.) 219; *Wilson v. Hamilton*, 4 Ohio St. 722; *Harvey v. Rose*, 26 Ark. 3; *Powell v. Mills*, 37 Miss. 691; *Griffith v. Cave*, 22 Cal. 535; *May v. Hanson*, 5 Cal. 360; *Littlejohn v. Jones*, 2 McMul. (S. C.) 365; *Hall v. Renfro*, 3 Metc. (Ky.) 51; *Babcock v. Herbert*, 3 Ala. 392; *Self v. Dunn*, 42 Ga. 528.

<sup>53</sup> *Steele v. McTyre*, 31 Ala. 667.

<sup>54</sup> 2 Kent, Comm. 599; *Harrington v. M'Shane*, 2 Watts (Pa.) 443; *Benett*

ers<sup>55</sup> and trustees.<sup>56</sup> A company operating sleeping cars in connection with railway trains is not a common carrier, nor an innkeeper, as to the goods or baggage of the passenger.<sup>57</sup> But such companies are liable for ordinary negligence in protecting passengers from loss by theft.<sup>58</sup> Their liability rests solely upon a failure to use proper care.<sup>59</sup> The same rule holds good in regard to steamships.<sup>60</sup> Where one hires cars from a railway company, and the latter agrees to furnish the motive power and the use of its tracks for transportation, it has been held both that the company is,<sup>61</sup> and that it is not,<sup>62</sup> a common carrier. A tugboat is not, as

v. Steam-Boat Co., 6 C. B. 775; Crouch v. Railway Co., 14 C. B. 255, 284; Clark v. Barnwell, 12 How. 272; The Delaware, 14 Wall. 579; Hastings v. Pepper, 11 Pick. (Mass.) 41; Gage v. Tirrell, 9 Allen, 299; Elliott v. Rossell, 10 Johns. 1; Williams v. Branson, 1 Murph. (N. C.) 417; Crosby v. Fitch, 12 Conn. 410; Parker v. Flagg, 26 Me 181; Swindler v. Hilliard, 2 Rich. Law (S. C.) 286; McGregor v. Kilgore, 6 Ohio, 358; Hollister v. Nowlen, 19 Wend. 234; Cole v. Goodwin, 1d. 251; Jones v. Pitcher, 3 Stew. & P. (Ala.) 135. A ship is a common carrier, though it does not ply on any definite route, or between fixed termini, where it is let to any one who applies, under a special agreement. *Liver Alkali Co. v. Johnson*, L. R. 9 Exch. 338, 7 Exch. 267.

<sup>55</sup> *Nichols v. Smith*, 115 Mass. 332; *Paige v. Smith*, 99 Mass. 395; *Blumenthal v. Brainerd*, 38 Vt. 402.

<sup>56</sup> *Rogers v. Wheeler*, 2 Lans. (N. Y.) 486, 43 N. Y. 598; *Faulkner v. Hart*, 44 N. Y. Super. Ct. 471; *Sprague v. Smith*, 29 Vt. 421.

<sup>57</sup> *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; *Pullman Car Co. v. Gardner*, 3 Penny. (Pa.) 78; *Blum v. Car Co.*, 1 Flip. 500, Fed. Cas. No. 1,574; *Woodruff Sleeping & Parlor Coach Co. v. Diehl*, 84 Ind. 474; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 44 N. W. 226; *Barrott v. Car Co.*, 51 Fed. 796; *Pullman Palace Car Co. v. Freudenstein*, 3 Colo. App. 540, 34 Pac. 578. See articles, 25 Am. Law Rev. 569, and 20 Am. Law Rev. 159. See "Innkeepers," ante, p. 262; "Carriers," post, p. 400.

<sup>58</sup> *Lewis v. Car Co.*, 143 Mass. 267, 9 N. E. 615; *Whitney v. Car Co.*, 143 Mass. 243, 9 N. E. 619; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. 814.

<sup>59</sup> *Blum v. Car Co.*, 1 Flip. 500, Fed. Cas. No. 1,574, 5 Myers, Fed. Dec. 640.

<sup>60</sup> *Clark v. Burns*, 118 Mass. 275. Steamboat owners are regarded and held to the responsibilities of common carriers, but are not responsible to passen-

<sup>61</sup> *Mallory v. Railroad Co.*, 39 Barb. 488; *Hannibal R. Co. v. Swift*, 12 Wall. 262.

<sup>62</sup> *East Tennessee & G. R. Co. v. Whittle*, 27 Ga. 535; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 624; *Kimball v. Railroad Co.*, 26 Vt. 247.



to goods on the vessel in tow, nor as to the vessel itself.<sup>63</sup> Neither is a railway company which, under a special contract, hauls a circus train owned, loaded, and controlled by proprietors of the circus.<sup>64</sup> Postmasters, mail contractors, and carriers,<sup>65</sup> log driving

gers for the loss of their wearing apparel which they carry about their person, and not delivered to the officers of the boat as baggage for safe-keeping. *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302; *Abbott v. Bradstreet*, 55 Me. 530.

<sup>63</sup> *The Neffie*, 1 Abb. (U. S.) 465, Fed. Cas. No. 10,063, 5 Myers, Fed. Dec. 19; *Brown v. Clegg*, 63 Pa. St. 51; *Hays v. Millar*, 77 Pa. St. 238; *Leonard v. Hendrickson*, 18 Pa. St. 40; *Hays v. Paul*, 51 Pa. St. 134; *Wells v. Navigation Co.*, 2 N. Y. 204, 8 N. Y. 375; *Caton v. Rumney*, 13 Wend. 387; *Alexander v. Greene*, 3 Hill, 9; *Arctic Fire Ins. Co. v. Austin*, 54 Barb. 559; *Merrick v. Brainard*, 38 Barb. 574; *Transportation Line v. Hope*, 95 U. S. 297; *The Webb*, 14 Wall. 406; *Varble v. Bigley*, 14 Bush (Ky.) 698; *The New Philadelphia*, 1 Black, 62; *The Oconto*, 5 Biss. 460, Fed. Cas. No. 10,421; *Abbey v. The Robert L. Stevens*, 22 How. Prac. 78; *Wooden v. Austin*, 51 Barb. 9; *The Margaret*, 94 U. S. 494; *Symonds v. Pain*, 6 Hurl. & N. 709; *The Julia*, 14 Moore P. C. 210. But see, contra, *Bussey v. Transportation Co.*, 24 La. Ann. 165; *Clapp v. Stanton*, 20 La. Ann. 495; *Smith v. Pierce*, 1 La. 349; *White v. The Mary Ann*, 6 Cal. 462; *Walston v. Myers*, 5 Jones (N. C.) 174. See, also, *Ashmore v. Transportation Co.*, 28 N. J. Law, 180. In *Bussey v. Transportation Co.*, supra, it was suggested that a steam towboat might be employed in two very different ways, and that possibly this fact would explain the conflict of opinion. In the first place, it may be employed as a mere means of locomotion, under the entire control of the towed vessel, or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported, to the exclusion of the bailee, or the towing may be casual, merely, and not a regular business between fixed termini; and it might well be said that, under such circumstances, a towboat is not the common carrier. But a second and quite different method of employing a towboat is where she plies regularly between the fixed termini, towing for hire, and for all persons, barges laden with goods, and taking into her full possession and control, and out of the control of the bailor, the property thus transported. Such a case seems to satisfy every requirement in the definition of a common carrier.

<sup>64</sup> *Coup v. Railway Co.*, 56 Mich. 111, 22 N. W. 215; *Chicago, M. & St. P. R. Co. v. Wallace*, 14 C. C. A. 257, 66 Fed. 506. Generally, as to liabilities of company hauling cars of another company, see *Peoria & P. Union Ry. Co. v. United States Rolling-Stock Co.*, 136 Ill. 643, 27 N. E. 59.

<sup>65</sup> *Lane v. Cotton*, 1 Ld. Raym. 646; *Dunlop v. Munroe*, 7 Cranch, 242; *Wiggins v. Hathaway*, 6 Barb. 632; *Schroyer v. Lynch*, 8 Watts (Pa.) 453; *Central Railroad & Banking Co. v. Lampley*, 76 Ala. 357.

and booming companies,<sup>66</sup> are not common carriers. "Bridge,<sup>67</sup> canal,<sup>68</sup> and turnpike<sup>69</sup> companies organized merely for the purpose of furnishing a thoroughfare over which others may transport goods, but not engaged in transportation themselves, are not common carriers."<sup>70</sup> Carriers of live stock are common carriers.<sup>71</sup>

### SAME—WHEN LIABILITY ATTACHES.

**67. Liability attaches when goods are delivered to and accepted by the carrier for immediate transportation (p. 314).**

**68. Acceptance may be presumed when goods are left in the usual place, in accordance with the contract or custom of the carrier to so receive them (p. 318).**

#### *Delivery for Immediate Transportation.*

The responsibility of a common carrier for goods intrusted to him commences when there has been a complete delivery to him for the purpose of immediate transportation.<sup>72</sup> If, without putting them in

<sup>66</sup> Mann v. Booming Co., 46 Mich. 38, 8 N. W. 550.

<sup>67</sup> Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567, 616; Grigsby v. Chappell, 5 Rich. Law (S. C.) 443.

<sup>68</sup> Exchange Fire Ins. Co. v. Delaware & H. Canal Co., 10 Bosw. (N. Y.) 180; Pennsylvania Canal Co. v. Burd, 90 Pa. St. 281; Watts v. Canal Co., 64 Ga. 88.

<sup>69</sup> Lake Superior & M. R. Co. v. U. S., 93 U. S. 442, 444.

<sup>70</sup> Hutch. Carr. § 81e. As to whether an irrigating company is a common carrier of water, see Wheeler v. Irrigation Co., 10 Colo. 582, 17 Pac. 487.

<sup>71</sup> See post, p. 371.

<sup>72</sup> Michigan Southern & N. I. R. Co. v. Shurtz, 7 Mich. 515; Grand Tower Manuf'g & Transp. Co. v. Ullman, 89 Ill. 244; Clarke v. Needles, 25 Pa. St. 338; Merriam v. Railroad Co., 20 Conn. 354; Blossom v. Griffin, 13 N. Y. 569; Evershed v. Railway Co., 47 Law J. Q. B. 284, 3 Q. B. Div. 134; St. Louis, I. M. & S. Ry. Co. v. Murphy, 60 Ark. 333, 30 S. W. 419; London & L. Fire Ins. Co. v. Rome, W. & O. R. Co., 144 N. Y. 200, 39 N. E. 79; Id., 23 N. Y. Supp. 231, 68 Hun, 598; Stewart v. Gracy, 93 Tenn. 314, 27 S. W. 664; Gulf, C. & S. F. Ry. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, and 18 S. W. 948; McCullough v. Railway Co., 34 Mo. App. 23; Barron v. Eldredge, 100 Mass. 455; Illinois Cent. R. Co. v. Smyser, 38 Ill. 354. "To complete the delivery of goods to the carrier, it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge and

transit, the carrier, for his own temporary convenience, places them in store, still the liability of a carrier attaches.<sup>73</sup> The delivery must be for immediate transportation, and, of course, it cannot be complete if anything remains to be done by the shipper before the goods can be sent on their way.<sup>74</sup> If by the usage and course of business, and especially if by express request, the shipment is delayed for further orders as to their destination, or for the convenience of the owner, then, during the time of such delay, the liability is that of a warehouseman.<sup>75</sup> The more stringent liability of a common carrier only attaches when the duty of immediate transportation arises. It then shifts from that of a warehouseman, although the goods remain unmoved in the storehouse. Whether the responsibility be in one capacity or the other is seldom a matter of express agreement be-

consent." *Grosvenor v. Railroad Co.*, 39 N. Y. 34. See, also, *Bergheim v. Railway Co.*, 3 C. P. Div. 221. "When the owner of the goods has done all in his power, and all that he is required to do, by his understanding with the carrier, or the usage of the business, to further the shipment, and it becomes, then, the duty of the carrier to do whatever else is necessary to put them in transitu, the delivery and acceptance will be considered as complete from the time the carrier is informed that they are ready for him." *Hutch. Carr.* § 99. A carrier is liable for the loss of baggage of an intending passenger, delivered to it, before purchasing a ticket, on the night before the train was to leave. *Lake Shore & M. S. Ry. Co. v. Foster*, 104 Ind. 293, 4 N. E. 20. As to what is a reasonable time before starting of a train, in which to deliver baggage, see *Hickox v. Railroad Co.*, 31 Conn. 281; *Lake Shore & M. S. Ry. Co. v. Foster*, 104 Ind. 293, 4 N. E. 20. A carrier is liable as a common carrier,—i. e. insurer,—even before time for beginning of the transit. 3 *Wood, Ry. Law*, § 404.

<sup>73</sup> *Rogers v. Wheeler*, 52 N. Y. 262; *Fitchburg & W. R. Co. v. Hanna*, 6 Gray, 539; *Boehm v. Combe*, 2 Maule & S. 172, 174; *Hutch. Carr.* § 89; *Wood, Browne, Carr.* § 84.

<sup>74</sup> *Michigan Southern & N. I. R. Co. v. Shurtz*, 7 Mich. 515; *Moses v. Railroad*, 4 *Fost. (N. H.)* 71; *Rogers v. Wheeler*, 52 N. Y. 262; *O'Neill v. Railroad Co.*, 60 N. Y. 138; *Wade v. Wheeler*, 3 *Lans. (N. Y.)* 201; *Barron v. Eldredge*, 100 *Mass.* 455; *Fitchburg & W. R. Co. v. Hanna*, 6 Gray, 539; *St. Louis, I. M. & S. Ry. Co. v. Knight*, 122 U. S. 79, 7 *Sup. Ct.* 1132.

<sup>75</sup> *St. Louis, A. & T. H. R. Co. v. Montgomery*, 39 *Ill.* 335; *Barron v. Eldredge*, 100 *Mass.* 455; *Mt. Vernon Co. v. Railroad Co.*, 92 *Ala.* 296, 8 *South.* 687; *O'Neill v. Railroad Co.*, 60 N. Y. 138; *Schmidt v. Railway Co.*, 90 *Wis.* 504, 63 N. W. 1057.

tween the parties. It arises out of the relation which the parties sustain, and the duties which the law imposes.<sup>76</sup>

*Same—Agents.*

The delivery to and acceptance by the carrier may, of course, be made by duly-authorized agents.<sup>77</sup> The ordinary rules of agency apply. An authority to deliver goods to a common carrier for transportation includes all the necessary and usual means of carrying it into effect. It can only be executed by obtaining the consent of the carrier to receive them, and the agent is therefore authorized to stipulate for the terms of transportation.<sup>78</sup> Ordinarily a shipper is justified in assuming that a person in charge of the carrier's usual place for receiving goods has authority to accept such goods, and contract for the carrier.<sup>79</sup> So if, before sending goods by a carrier, the sender

<sup>76</sup> Story, Bailm. § 535; *Buckland v. Express Co.*, 2 Redf. Am. Ry. Cas. 46; *Judson v. Western R. Corp.*, 4 Allen, 520; *Barron v. Eldredge*, 100 Mass. 455.

<sup>77</sup> See ante, p. 18.

<sup>78</sup> See, also, *Nelson v. Railroad Co.*, 48 N. Y. 498; *Jennings v. Railway Co.*, 52 Hun, 227, 5 N. Y. Supp. 140; *Squire v. Railroad Co.*, 98 Mass. 239; *York Co. v. Central R. Co.*, 3 Wall. 113; *London & N. W. R. Co. v. Bartlett*, 7 Hurl. & N. 400. An agent, employed to ship goods to the owner, may make such contract with the common carrier as, in the honest exercise of his discretion, he sees fit. *Shelton v. Transportation Co.*, 59 N. Y. 258.

<sup>79</sup> *Cronkite v. Wells*, 32 N. Y. 247, 253; *Rogers v. Railroad Co.*, 2 Lans. (N. Y.) 269; *Ouimit v. Henshaw*, 35 Vt. 605; *Whitbeck v. Schuyler*, 44 Barb. 469; *Pacific Exp. Co. v. Black* (Tex. Civ. App.) 27 S. W. 830. But not where the apparent scope of his employment shows it to be clearly beyond his authority. *Ford v. Mitchell*, 21 Ind. 54; *Trowbridge v. Chapin*, 23 Conn. 595. Although an agent has no authority to issue a bill of lading without receiving the goods, yet, as against a person advancing money in good faith upon such receipt, the carrier is estopped to deny that the goods were received. *Brooke v. Railroad Co.*, 108 Pa. St. 529, 1 Atl. 206; *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195, 12 N. E. 433. Contra, *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 46 N. W. 342; *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11. And compare *Robinson v. Railroad Co.*, 16 Fed. 57. "It is the duty of a railway company to have servants capable of giving directions, and of dealing with everything that the exigency of the traffic may require (*Taff Vale Rail Co. v. Giles*, 23 Law J. Q. B. 43, 2 El. & Bl. 823); and their servants, acting in the ordinary scope of their employment, would have authority to receive goods, and enter into contracts as to the forwarding of them (*Long v. Horne*, 1 Car. & P. 610; *Winkfield v. Packington*, 2 Car. & P. 599). As a rule the officials at a railway station (*Pickford v. Railroad Co.*, 12

applies at his wharf to know at what price they will be carried, and is told by a clerk who is transacting the business there, and on the faith of this sends the goods, the carrier cannot charge more, although he had previously ordered his clerks to charge a higher rate than the one named.<sup>80</sup> "Persons dealing with railroad corporations, and parties engaged in the transportation of freight, have a right to consider that those usually employed in the business of receiving and forwarding it have ample authority to deal with them. It is enough to establish a delivery, in the first instance, to prove that a person thus acting received and accepted the property for the purpose of transportation; and, even although it subsequently appears that another employé was actually the agent having charge of this department of business, yet the company who sanction the performance of this duty by other persons in their employment, and thus hold out to the world that they

Mees. & W. 766; *Wilson v. Railroad Co.*, 17 Law T. 223); the company's draymen, where such are employed to collect, or usually collect, goods on the road, or at the houses of the consignors (*Davey v. Mason*, Car. & M. 45; *Baxendale v. Hart*, 21 Law J. Exch. 123, 6 Exch. 769); the servants of another carrier, engaged by the company, under a subcontract, to deliver and collect goods (*Machin v. Railroad Co.*, 17 Law J. Exch. 271, 2 Exch. 415); a person accustomed to book for the company, although the servant of, and deriving his authority from, another and separate carrier, who undertakes the transit during a stage of the journey anterior to the goods actually coming into the company's possession (*McCourt v. Railroad Co.*, 3 Ir. C. L. 107, 402),—would be considered persons to whom a good delivery might be made, and who would be competent to enter into a contract, ordinary or special, for the carriage of the goods. But a servant could not bind the company beyond the authority presumed from his employment (*Great Western R. Co. v. Willis*, 34 Law J. C. P. 195, 18 C. B. [N. S.] 748; *Horn v. Railroad Co.*, 42 Law J. C. P. 59, L. R. 8 C. P. 131; per *Blackburn, J.*); nor even to the extent of the authority presumable from his employment, if the customer have notice of a more limited authority (*Walker v. Railroad Co.*, 23 Law J. Q. B. 73, 2 El. & Bl. 750); nor when acting in contravention of his duty, as where an agent, whose duty was to give receipts for goods actually received, fraudulently gave a receipt for goods which had never been received (*Coleman v. Riches*, 24 Law J. C. P. 125, 16 C. B. 104); nor when acting in defiance of the known course of business of the company" (*Redm. Ry. Carr.* p. 42).

<sup>80</sup> *Winkfield v. Packington*, 2 Car. & P. 599. Depot agents have the power as incident to the office, to make reasonable regulations as to the conduct of business at their depots, unless restricted, controlled, or limited in that respect. *Smith v. Chamberlain*, 38 S. C. 529, 17 S. E. 371.



are authorized agents, are not at liberty to relieve themselves from responsibility by repudiating their acts.”<sup>81</sup>

*Same—Place of Delivery.*

Delivery may be made to a carrier wherever he or his authorized agent will accept the goods.<sup>85</sup> But if the delivery is not made at the place appointed by the carrier, or at his office or place of business, it must be accepted by the carrier himself, or his duly-authorized agent, or the carrier will not be bound.<sup>86</sup> The presumption that one in charge of the usual place of receiving goods has authority to do so does not apply where the delivery is made elsewhere.<sup>87</sup>

*Acceptance by Carrier.*

It has been seen that a bailment cannot arise in the absence of the bailee's consent.<sup>88</sup> Liability as a common carrier, therefore, does not attach until the goods have been accepted by the carrier.<sup>89</sup> But the

<sup>81</sup> *Grosvenor v. Railroad Co.*, 39 N. Y. 34. See, also, *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195, 12 N. E. 433; *Goodrich v. Thompson*, 4 Rob. (N. Y.) 75, 44 N. Y. 324; *Isaacson v. Railroad Co.*, 94 N. Y. 278; *Goddard v. Mallory*, 52 Barb. 87; *Reynolds v. Toppan*, 15 Mass. 370; *Burroughs v. Railroad Co.*, 100 Mass. 96; *Haggerty v. Railroad Co.*, 59 Mich. 366, 26 N. W. 639; *Ford v. Mitchell*, 21 Ind. 54; *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. St. 77; *Lackawanna & B. R. Co. v. Chenewith*, 52 Pa. St. 382; *Strohn v. Railroad Co.*, 23 Wis. 126; *Grover & B. S. M. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672; *Baker v. Railroad Co.*, 91 Mo. 152, 3 S. W. 486; *Harrison v. Railway Co.*, 74 Mo. 364; *Turner v. Railway Co.*, 20 Mo. App. 632; *Cloud v. Railway Co.*, 14 Mo. App. 136; *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583. A shipper's knowledge of directions to the carrier's agent not to receive certain articles for transportation will not relieve the carrier from liability if their transportation is actually undertaken. *Bennett v. Express Co.*, 83 Me. 236, 22 Atl. 159.

<sup>85</sup> *Phillips v. Earle*, 8 Pick. (Mass.) 182.

<sup>86</sup> *Hutch. Carr.* § 87; *Cronkite v. Wells*, 32 N. Y. 247; *Southern Exp. Co. v. Newby*, 36 Ga. 635. Cf. *Whitbeck v. Schuyler*, 44 Barb. 469; *Missouri Coal & Oil Co. v. Hannibal & St. J. R. Co.*, 35 Mo. 84.

<sup>87</sup> *Blanchard v. Isaacs*, 3 Barb. 388.

<sup>88</sup> See ante, p. 13.

<sup>89</sup> *Missouri Pac. Ry. Co. v. McFadden*, 154 U. S. 155, 14 Sup. Ct. 990. “There must be either an actual or constructive acceptance by the carrier, or the contract of bailment will not arise. The essential element of such a contract is that the bailee is to be trusted with the goods, and if he is not made aware of the intention of the party to trust the goods to his keeping, or if the party, instead of trusting the goods to him, still retains the care of them, the bail-

acceptance may be either actual or constructive.<sup>90</sup> Thus, it has been held that depositing goods on a dock without notice to the carrier is insufficient.<sup>91</sup> In such cases there is no bailment and no liability, for there has been no acceptance.

*Same—Contract, Custom and Usage.*

The carrier, for his own protection, may make reasonable regulations as to place and manner of delivery. The parties may themselves agree upon a mode and manner of delivery, and their agreement will govern. So, if they agree that goods for transportation may be deposited at any particular place without notice to the carrier, a deposit in that place will constitute a sufficient delivery.<sup>92</sup> The acceptance by the carrier is presumed, if, indeed, it cannot be said to have been made in advance. So, also, an established custom and usage in regard to receiving goods for transportation will bind the parties. Where goods are left in the usual place, in accordance with the custom of the carrier to receive them there, acceptance is presumed.<sup>93</sup> Thus, in *Wright v. Caldwell*<sup>94</sup> the court, per Whipple, J.,

ment to the carrier evidently does not arise, or arises only in a modified form. Thus, where a wharfinger delivered goods, which were sent to a wharf, to go on board a vessel, to one of the crew, and did not deliver them to the captain of the vessel, or to some other person that he might reasonably presume to be in authority, it was held that he had not discharged his duty, and he, and not the shipper [the carrier], was liable for the loss which occurred owing to his negligence." *Wood, Browne, Carr.* § 90. And see *Leigh v. Smith*, 1 Car. & P. 638.

<sup>90</sup> *Merriam v. Railroad Co.*, 20 Conn. 354; *Converse v. Transportation Co.*, 33 Conn. 166; *Ford v. Mitchell*, 21 Ind. 54; *Green v. Railroad Co.*, 38 Iowa, 100, 41 Iowa, 410; *Wright v. Caldwell*, 3 Mich. 51; *Packard v. Getman*, 6 Cow. (N. Y.) 757; *Freeman v. Newton*, 3 E. D. Smith (N. Y.) 246; *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 354; *O'Bannon v. Southern Exp. Co.*, 51 Ala. 481; *Yoekum v. Dryden* (Tex. Civ. App.) 26 S. W. 312; *Evansville & T. H. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296.

<sup>91</sup> *Packard v. Getman*, 6 Cow. (N. Y.) 757; *Merriam v. Railroad Co.*, 20 Conn. 354. Or merely leaving them on his premises. *Grosvenor v. Railroad Co.*, 39 N. Y. 34; *Buckman v. Levi*, 3 Camp. 414.

<sup>92</sup> *Hutch. Carr.* § 90.

<sup>93</sup> *Lake Shore & M. S. Ry. Co. v. Foster*, 104 Ind. 293, 4 N. E. 22; *Wright v. Caldwell*, 3 Mich. 51; *Converse v. Transportation Co.*, 33 Conn. 166; *Merriam v. Railroad Co.*, 20 Conn. 354; *Green v. Railroad Co.*, 38 Iowa, 100, 41 Iowa, 410. But see *Packard v. Getman*, 6 Cow. (N. Y.) 757.

<sup>94</sup> 3 Mich. 51.

say: "It is well settled by a series of adjudications of high authority that if a uniform custom is established and recognized by the carrier, and is known to the public, that property intended for carriage may be deposited in a particular place, without express notice to him, that a deposit of property for that purpose, in accordance with the custom, is constructive notice, and would render any other form of delivery unnecessary. The rule is founded in reason, as the usage, if habitual, is a declaration by the carrier to the public that a delivery of property in accordance with the usage will be deemed an acceptance of it by him for the purpose of transportation. To allow a carrier, when property is thus delivered, to set up by way of defense the general rule which requires express notice, would operate as a fraud upon the public, and lead to manifest injustice." So a deposit of cotton in the street adjacent to a railroad platform, in accordance with a custom to deposit it there for carriage, is sufficient.<sup>95</sup> So, where goods were delivered, in the usual manner, for transportation by a common carrier, on his private dock, which was in his exclusive use for the purpose of receiving property to be transported by him, it was held that such delivery was a good delivery to the carrier, to render him liable for the loss of the goods, although neither he nor his agent was otherwise notified of such delivery.<sup>96</sup> The custom or usage must be strictly followed, or the carrier will not be bound.

<sup>95</sup> *Montgomery & E. Ry. Co. v. Kolb*, 73 Ala. 396.

<sup>96</sup> *Merriam v. Railroad Co.*, 20 Conn. 354. See, also, *Converse v. Transportation Co.*, 33 Conn. 166.

## SAME -RIGHTS AND LIABILITIES.

69. The rights and liabilities of common carriers may, for convenience, be treated under the following heads, viz.:

- (a) The obligation of carrying for all (p. 321).
- (b) The duty of furnishing equal facilities to all (p. 327).
- (c) The right to compensation (p. 331).
- (d) Liability for loss or damage—As insurers (p. 351).
- (e) Liability for loss or damage—As ordinary bailees (p. 401).
- (f) Liability for delay (p. 408).
- (g) Special property of carriers—Right of action (p. 412).
- (h) Special contract (p. 413).

## SAME—DUTY TO CARRY FOR ALL.

70. It is the duty of a common carrier to accept and transport all goods offered, subject to the following limitations:

- (a) The extent of his profession (p. 321).
- (b) The extent of his facilities (p. 324).
- (c) The condition of the goods (p. 325).
- (d) Payment of charges in advance (p. 326).
- (e) The shipper's authority to deliver (p. 326).

71. Common carriers are not obliged to accept goods of a kind they do not profess to carry, nor to carry by other than the customary means and route.

Within certain limits, it is the duty of a common carrier to carry all goods offered. This duty is their distinguishing characteristic, and for breach of it a carrier is liable in damages to the person whose goods are refused.<sup>97</sup> Its performance may be compelled by injunction

<sup>97</sup> *Ayres v. Railroad Co.*, 71 Wis. 372, 37 N. W. 432; *Riley v. Horne*, 5 Bing. 217, 220. See ante, p. 308.

or mandamus.<sup>98</sup> If it does not exist, the carrier is not a common carrier, though he may carry for hire.<sup>99</sup>

"A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office.<sup>100</sup> He is under a legal obligation. Others have a corresponding legal right. His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right."<sup>101</sup>

*Public Profession—Nature of Goods Carried.*

The duty of a common carrier to carry for all who offer arises from the public profession he has made, and is limited to it. A person may profess to carry a particular description of goods only, as, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be compelled to carry to or from intermediate places.<sup>102</sup> But, to the extent of their public profession, common carriers must carry for all who offer.<sup>103</sup>

<sup>98</sup> Chicago & N. Ry. Co. v. People, 56 Ill. 365; State v. Delaware, L. & W. R. Co., 48 N. J. Law, 55, 2 Atl. 803; Sandford v. Railroad Co., 24 Pa. St. 378; People v. New York Cent. & H. R. R. Co., 28 Hun, 543; Menacho v. Ward, 27 Fed. 529; Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. 481. Where an action for damages is an adequate remedy, mandamus will not lie. People v. New York, L. E. & W. R. Co., 22 Hun, 533; People v. Babcock, 16 Hun, 313. A common carrier may be indicted, at common law, for refusal to carry.

<sup>99</sup> Hutch. Carr. § 111.

<sup>100</sup> Sandford v. Railroad Co., 24 Pa. St. 378; New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. 344, 382; Shelden v. Robinson, 7 N. H. 157, 163, 164; Gray v. Jackson, 51 N. H. 9, 10; Ansell v. Waterhouse, 2 Chit. 1, 4; Hollister v. Nowlen, 19 Wend. 234, 239.

<sup>101</sup> McDuffee v. Railroad Co., 52 N. H. 430.

<sup>102</sup> Johnson v. Railway Co., 4 Exch. 367; Central R. & B. Co. v. Lampley, 76 Ala. 357; Honeyman v. Railroad Co., 13 Or. 352, 10 Pac. 628; Kimball v. Railroad Co., 26 Vt. 247; Pitlock v. Wells, Fargo & Co., 109 Mass. 452; Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 16, 33, Fed. Cas. No. 2,730; Sewall v. Allen, 6 Wend. 335, 346; Kuter v. Railroad Co.,

<sup>103</sup> Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329; Tunnel v. Pettijohn, 2 Har. (Del.) 48; Knox v. Rives, 14 Ala. 249; Powell v. Mills, 30 Miss. 231; Hutch. Carr. §§ 56a, 78, 112.



In *Dickson v. Great Northern Ry. Co.*,<sup>104</sup> Lindley, J., said: "At common law no person is bound, as a common carrier, to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and, if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms. In this case the defendants expressly say that they are not common carriers of dogs, and will not carry dogs except on their own terms. The common law, therefore, does not oblige the company to carry dogs at all, and at common law no action will lie against the company for refusing to carry a dog. Moreover, as no person is bound to enter into an agreement with one person simply because he is in the habit of entering into similar agreements with others, a company which is not a common carrier of dogs, but which may be in the habit of carrying dogs on certain terms, may, at common law, decline to accept any particular dog, even on those terms, and may refuse to carry the dog at all, or may refuse to carry it except upon some other terms which the company may specify. At common law, therefore, it seems to me, the defendants can lawfully refuse to carry dogs except upon their own terms."<sup>105</sup>

1 Biss. 35, Fed. Cas. No. 7,955. Carriers of money, *Shelden v. Robinson*, 7 N. H. 157; *Kemp v. Coughtry*, 11 Johns. 107, 109; *Emery v. Hersey*, 4 Greenl. 407; *Harrington v. M'Shane*, 2 Watts (Pa.) 443; *Merwin v. Butler*, 17 Conn. 138; *Dwight v. Brewster*, 1 Pick. (Mass.) 50.

<sup>104</sup> 18 Q. B. Div. 176, 183. He may be compelled to carry goods only upon the terms upon which he professes to be willing to carry, and therefore he may refuse goods tendered at an unreasonable hour, or at a place not the one appointed by him. *Pickford v. Railway Co.*, 12 Mees. & W. 766. And see *Lane v. Cotton*, 1 Ld. Raym. 646, 652; *Louisville, N. A. & C. Ry. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370; *Cronkite v. Wells*, 32 N. Y. 247. Goods must be offered for carriage a reasonable time before the hour at which the train starts. *Palmer v. Railway Co.*, 35 Law J. C. P. 289; *Garton v. Railway Co.*, 28 Law J. C. P. 306. A carrier may refuse to receive goods tendered an unreasonable time before they are to be shipped. See *Lane v. Cotton*, 1 Ld. Raym. 646, 652.

<sup>105</sup> *Honeyman v. Railroad Co.*, 13 Or. 352, 10 Pac. 628.

*Same—Means and Route.*

A common carrier is not bound by his general public obligation to provide other means of transportation than such as it owns, uses, or holds out to the public on its own route for that purpose.<sup>106</sup> "Thus, common carriers by wagon cannot be required to carry by railroad. Nor can carriers by water be required to carry by land, nor can a carrier be required to carry to a point or by a route to which his business does not extend."<sup>107</sup>

**72. Common carriers are not obliged to accept goods when their facilities are insufficient to handle them, nor are they obliged to provide sufficient facilities, except:**

**EXCEPTION—By statute, in many states, railroad companies must provide facilities sufficient to handle all the traffic which can be reasonably anticipated.**

A common carrier is not bound to supply more carts than he is in the habit of employing, because more goods are tendered than usual.<sup>108</sup> Therefore he is not obliged to accept and carry goods if the vehicle which he ordinarily employs for the transportation of goods is not able to contain the article which is offered.<sup>109</sup> But, as regards railway companies, this must be received with some qualification. If the pressure of traffic is such as the company might reasonably have anticipated and provided for, it is probable that they would not be released from the liability to receive goods on the ground of want of conveniences.<sup>110</sup> They are under a duty to supply reasonably sufficient facilities, in return for the special privileges enjoyed by them. The statutes of most of the states expressly require them to do so. Under such statutes, a railroad com-

<sup>106</sup> *Pittsburgh, C. & St. L. Ry. Co. v. Morton*, 61 Ind. 539; *Pitlock v. Wells, Fargo & Co.*, 109 Mass. 452.

<sup>107</sup> *Hutch. Carr.* § 56b. See, also, "Connecting Carriers," post, p. 463.

<sup>108</sup> *Wood, Browne, Carr.* § 73; *Johnson v. Railway Co.*, 4 Exch. 367, 373.

<sup>109</sup> The carrier must provide facilities adapted to the kind of freight received for shipment. *Beard v. Railway Co.*, 79 Iowa, 518, 44 N. W. 800.

<sup>110</sup> See *Wallace v. Railway Co.*, 17 Wkly. Rep. 464; *Peet v. Railway Co.*, 20 Wis. 594; *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488.

pany is not liable for failure to provide for an extraordinary or unusual influx of freight.<sup>111</sup> Where a shipper applies to a railroad company for cars, to be furnished at a certain time and place, it is the duty of the company to inform the shipper in a reasonable time whether it is able to furnish such cars; and, if it fails to do so, it is liable to the shipper for damages caused by the delay.<sup>112</sup>

**73. A common carrier is not obliged to accept dangerous or suspicious goods, or goods unfit for shipping.**

A carrier may refuse to accept goods not properly packed for shipping,<sup>113</sup> or goods which are dangerous, or likely to injure goods already received.<sup>114</sup> Where the goods are of a suspicious character, he may refuse to receive them unless made acquainted with their contents.<sup>115</sup> Otherwise he has no right to insist upon being informed of the contents of packages offered for carriage.<sup>116</sup> A

<sup>111</sup> Toledo, W. & W. Ry. Co. v. Lockhart, 71 Ill. 627; Galena & C. U. R. Co. v. Rae, 18 Ill. 488; Faulkner v. Railroad Co., 51 Mo. 311; Condict v. Railway Co., 54 N. Y. 500; Chicago, St. L. & P. R. Co. v. Wolcott (Ind. Sup.) 39 N. E. 451.

<sup>112</sup> Ayres v. Railway Co., 71 Wis. 372, 37 N. W. 432; Newport News & M. V. R. Co. v. Mercer (Ky.) 29 S. W. 301; Chicago, St. L. & P. R. Co. v. Wolcott (Ind. Sup.) 39 N. E. 451. And see Gulf, C. & S. F. Ry. Co. v. Hodge (Tex. Civ. App.) 30 S. W. 829; International & G. N. R. Co. v. Young (Tex. Civ. App.) 28 S. W. 819. As to the measure of damages, see Newport News & M. V. R. Co. v. Mercer (Ky.) 29 S. W. 301.

<sup>113</sup> Vicksburg Liquor & Tobacco Co. v. United States Exp. Co., 68 Miss. 149, 8 South. 332; Union Exp. Co. v. Graham, 26 Ohio St. 595. Goods packed so defectively as to entail upon the carrier extra care and risk may be refused. Munster v. Railway Co., 27 Law J. C. P. 308, 312. Hart v. Baxendale, 16 Law T. (N. S.) 396.

<sup>114</sup> The Nith, 36 Fed. 86.

<sup>115</sup> Nitro-Glycerine Case, 15 Wall. 524, Brass v. Maitland, 6 El. & Bl. 485; Crouch v. Railroad Co., 14 C. B. 285, 291; Riley v. Horne, 5 Bing. 217, 222.

<sup>116</sup> Nitro-Glycerine Case, 15 Wall. 524; Crouch v. Railroad Co., 14 C. B. 285, 291; Dinsmore v. Railroad Co., 3 Fed. 593. The right of the company to have parcels opened extends only to those suspected to contain dangerous articles. They have no general right, in all cases, and under all circumstances, to be informed of the contents tendered to be carried. Crouch v. Railway Co., 14 C. B. 255. Where a customer negligently fails to inform the carrier of the

carrier may refuse goods of such a character that they are likely to be destroyed by a mob.<sup>117</sup>

**74. Common carriers are not obliged to carry goods unless the transportation charges are paid in advance.**

Since common carriers cannot choose with whom they will deal, but must carry indifferently for all who offer, it is but just that their compensation shall be absolutely assured to them. Therefore the law gives them, not only a lien upon the goods carried, for their reasonable charges,<sup>118</sup> but also authorizes them to require payment in advance.<sup>119</sup> If such prepayment is not made on demand, the carrier is under no obligation to transport the goods. The money is not required to be paid down until the carrier receives the goods which he is bound to carry.<sup>120</sup> A carrier should therefore first accept the goods, and then demand payment as a condition precedent to transporting them.<sup>121</sup> Payment in advance may, of course, be waived, and is waived by an actual acceptance for carriage without a demand for prepayment.<sup>122</sup>

**75. Common carriers are not obliged to accept goods when offered by one not their owner or the owner's authorized agent.**

Common carriers are bound to accept goods for transportation only when offered by their lawful owner or his authorized agent.<sup>123</sup>

dangerous nature of a parcel, he will be liable for damages caused by it. *Farrant v. Barnes*, 31 Law J. C. P. 137, 11 C. B. (N. S.) 553.

<sup>117</sup> *Edwards v. Sherratt*, 1 East, 604; *Porcher v. Railroad Co.*, 14 Rich. Law (S. C.) 181, 184; *Story*, Bailm. § 508; *Hutch. Carr.* § 115; *Pearson v. Duane*, 4 Wall. 605.

<sup>118</sup> See post, p. 342.

<sup>119</sup> *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Pickford v. Railway Co.*, 8 Mees. & W. 372; *Bastard v. Bastard*, 2 Shaw. 81; *Wyld v. Pickford*, 8 Mees. & W. 443.

<sup>120</sup> *Pickford v. Railway Co.*, 8 Mees. & W. 372.

<sup>121</sup> *Hutch. Carr.* § 116.

<sup>122</sup> *Hutch. Carr.* § 117; *Grand Rapids & I. R. Co. v. Dlether*, 10 Ind. App. 206, 37 N. E. 39, 1069.

<sup>123</sup> *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Gurley v. Armstead*, 148 Mass. 267, 19 N. E. 389; *Hutch. Carr.* § 115a.

If they do so, however, in good faith, while they might not be liable for conversion, yet they would have no lien, as against the true owner, for their charges.<sup>124</sup>

*End Tues Feb 4th*

**SAME—DUTY TO FURNISH EQUAL FACILITIES TO ALL.**

76. Common carriers must carry indifferently for all who offer. They cannot make unjust discriminations between customers, or grant monopolies.

**A COMMON CARRIER MUST BE IMPERSONAL**

Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered.<sup>125</sup> All applying have an equal right to have their freight transported, in the order of their application.<sup>126</sup> Carriers cannot legally give undue and unjust preferences, or make unequal and extravagant charges. Having the means of transportation, they are liable to an action if they refuse to carry without just ground for such refusal. The very definition of a "common carrier" excludes the idea of the right to grant monopolies, or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application.<sup>127</sup> "That is not, in the ordinary legal sense, a public highway, in which one man is unreasonably privileged to use a convenient path, and another is unreasonably restricted to the gutter; and that is not a public service of common carriage, in which one enjoys an unreasonable preference or advantage, and another suffers an unreasonable prejudice or disadvantage. A denial of the entire right of service, by a refusal to

<sup>124</sup> Fitch v. Newberry, 1 Doug. (Mich.) 1; Guiley v. Armstead, 148 Mass. 267, 19 N. E. 389.

<sup>125</sup> New England Exp. Co. v. Maine Central R. Co. 57 Me. 188; International Exp. Co. v. Grand Trunk Ry. of Canada. 81 Me. 92, 16 Atl. 370; Houston & T. C. Ry. Co. v. Smith, 63 Tex. 322; McDuffee v. Railroad, 52 N. H. 430; Messenger v. Railroad Co., 37 N. J. Law. 531.

<sup>126</sup> Houston & T. C. Ry. Co. v. Smith, 63 Tex. 322; Great Western Ry. Co. of Canada v. Burns, 60 Ill. 284; Chicago & N. R. Co. v. People, 56 Ill. 365; Chicago & A. R. Co. v. People, 67 Ill. 11; Wibert v. Railroad Co., 12 N. Y. 245; Keeney v. Railroad Co., 47 N. Y. 525.

<sup>127</sup> New England Exp. Co. v. Railroad Co., 57 Me. 188; Chicago, St. L. & P. R. Co. v. Wolcott (Ind. Sup.) 39 N. E. 451.



carry, differs, if at all, in degree only, and the amount of damage done, and not in the essential legal character of the act, from a denial of the right in part by an unreasonable discrimination in terms, facilities, or accommodations. Whether the denial is general, by refusing to furnish any transportation whatever, or special, by refusing to carry one person or his goods; whether it is direct, by expressly refusing to carry, or indirect, by imposing such unreasonable terms, facilities, or accommodations as render carriage undesirable; whether unreasonableness of terms, facilities, or accommodations operate as a total or a partial denial of the right; and whether the unreasonableness is in the intrinsic, individual nature of the terms, facilities, or accommodations, or in their discriminating, collective, and comparative character,—the right denied is one and the same common right, which would not be a right if it could be rightfully denied, and would not be common, in the legal sense, if it could be legally subjected to unreasonable discrimination, and parceled out among men in unreasonably superior and inferior grades at the behest of the servant from whom the service is due.”<sup>128</sup>

*The “Express Cases.”*

In *New England Express Co. v. Maine Central R. Co.*,<sup>129</sup> it was held that an agreement by which a railroad company contracted to give one express company the exclusive use of a separate compartment in a car attached to each of their passenger trains, for the purpose of transporting the express company's messenger and merchandise, and agreed not to give any other express company like privileges, was illegal, and that an express company which had been refused such facilities might maintain an action for damages. Similar conclusions were reached in like cases in New Hampshire<sup>130</sup> and Pennsylvania.<sup>131</sup> In *Southern Express Co. v. St. Louis, I. M. & S. Ry. Co.*,<sup>132</sup> Justice Miller, on the circuit, held that a railroad company was not only bound to carry the goods offered by an express company, but was bound to furnish special cars for that purpose, and to permit an ex-

<sup>128</sup> *McDuffee v. Railroad Co.*, 52 N. H. 430, 450.

<sup>129</sup> 57 Me. 188.

<sup>130</sup> *McDuffee v. Railroad Co.*, 52 N. H. 430.

<sup>131</sup> *Sandford v. Railroad Co.*, 24 Pa. St. 373.

<sup>132</sup> 10 Fed. 210, 869.

press messenger to accompany and have charge of the goods.<sup>133</sup> On appeal to the supreme court of the United States, this decision was reversed, and it was held <sup>134</sup> that, while railroad companies must furnish the public with an express service, such companies are not obliged to furnish express facilities to all applying to them, but that they perform their whole duty to the public at large, and to each individual, when they afford the public all reasonable accommodations. "If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." Justice Miller dissented on the ground that railroad companies, as common carriers, are under legal obligation to carry express matter for any one engaged in that business, in a manner appropriate and usual to that business. Justice Field concurred in this view.

In *Sargent v. Boston & L. R. Corp.*,<sup>135</sup> it was held that a railroad company is not obliged to furnish an expressman with facilities and

<sup>133</sup> See, also, *Texas Exp. Co. v. Texas & P. Ry. Co.*, 6 Fed. 426; *Southern Exp. Co. v. Memphis, etc., R. Co.*, 8 Fed. 799.

<sup>134</sup> *St. Louis, I. M. & S. Ry. Co. v. Southern Exp. Co.*, 117 U. S. 1, 6 Sup. Ct. 542, 628.

<sup>135</sup> 115 Mass. 416. In *Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 16 S. E. 393, it was held that a statute providing that it shall be unlawful for any common carrier to give any unreasonable preference to any particular person, company, or locality, or any particular description of traffic, or to subject any person, company, or locality, or any particular description of traffic to any undue disadvantage, did not change or enlarge the duty imposed on railroad companies by the common law, under which they are not obliged, because they furnish facilities to one express company, to furnish other express companies with facilities for doing an express business on their roads, the same in all respects as they provide for themselves, or afford to any particular express company, where such railroad companies have never held themselves out as common carriers of express companies. A regulation concerning freight rates, which provides that no railroad company shall, by reason of any contract, with any express or other company, refuse to act as a common carrier, to transport any article proper for transportation by the train for which it is offered, does not require railroad companies to furnish an express company with facilities for carrying on its business on their roads, but simply requires them to transport articles. *Id.*

accommodations different in kind from those furnished the general public. The court said: "We know of no principle or rule of law which imposes upon a railroad corporation the obligation to perform service in the transportation of freight, otherwise than as a carrier of goods for the owner in accordance with their consignment, or which forbids it from establishing uniform regulations, applicable alike to all persons composing the public to whom the service is due. We are pointed to no provision in the charters of these defendants, or in the general laws relating to railroads, which subjects the use of their roads to the convenience or requirements of other carriers than the corporations authorized to construct and operate them, and such other railroads as may have been authorized to enter upon or unite with and use them." In this case there was no refusal to carry the plaintiff and his freight upon the same terms and in the same manner as the defendant performed like service for other companies. The defendant was itself carrying on an express business, and it merely refused to permit the plaintiff to occupy a portion of the space in the cars and stations in the same manner, and for the same purposes, as the defendant itself used and occupied them, paying therefor, and for the required transportation, some special rate, which could not well be adjusted otherwise than by special agreement.

In *Pfister v. Central Pac. R. Co.*,<sup>186</sup> it was distinctly held that railroad companies were not required to furnish express facilities to all, alike, who demand them. "The inconveniences which would follow from requiring railroad companies to extend equal express facilities to all persons, companies, and corporations regularly engaged in the express business would be multiplied beyond measure were they, either with or without previous notice, required to furnish like accommodations to each individual who might at any time, and for a single trip, see fit to demand them.

<sup>186</sup> 70 Cal. 169, 11 Pac. 686. And see *Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 16 S. E. 393.

## SAME—RIGHT TO COMPENSATION.

**77. Common carriers are entitled to a reasonable compensation, and no more, for their services.**

Common carriers, although obliged to carry goods for all who offer, are not obliged to do so gratis, nor even for an unreasonably low compensation. Such a requirement would amount to a confiscation of their property. Neither can they demand whatever sum they see fit; for, if that were permitted, they might practically nullify their obligation to carry for all, by asking exorbitant rates. The result is that common carriers are entitled to a reasonable compensation for their services, but to no more.<sup>187</sup>

*Rate—How Fixed.*

The amount of compensation may be fixed in several ways. The rate may be fixed by<sup>1</sup> statute, which, of course, will prevail unless the parties have agreed upon a different rate.<sup>188</sup> But, if the statute fixes a maximum rate which is unreasonably low, it is unconstitutional; for its effect is to deprive one of property without due

<sup>187</sup> Louisville, E. & St. L. R. Co. v. Wilson, 119 Ind. 352, 21 N. E. 341; Harris v. Packwood, 3 Taunt. 264; London & N. W. R. Co. v. Evershed, L. R. 3 App. Cas. 1029; Holford v. Adams, 2 Duer. 471; Camblos v. Railroad Co., 4 Brewst. 563. The shipper may maintain an action for refusal to carry upon reasonable terms. Carr v. Railway Co., 7 Exch. 707, per Parke, B. Unreasonable charges exacted may be recovered. Baldwin v. Steamship Co., 74 N. Y. 125; Peters v. Railroad Co., 42 Ohio St. 275; McGregor v. Railway Co., 35 N. J. Law, 89; Atchison & N. R. Co. v. Miller, 16 Neb. 661, 21 N. W. 451; Harmony v. Bingham, 12 N. Y. 99, 1 Duer. 209; Mobile & M. Ry. Co. v. Steiner, 61 Ala. 559; Lafayette & I. R. Co. v. Pattison, 41 Ind. 312.

<sup>188</sup> The legislature may regulate rates within reasonable limits. Hunn v. Illinois, 94 U. S. 113; Chicago, B. & Q. R. Co. v. Iowa, Id. 153; Peik v. Railway Co., Id. 164; Chicago, M. & St. P. R. Co. v. Ackley, Id. 179; Ruggles v. Illinois, 108 U. S. 526, 2 Sup. Ct. 832; Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191; Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. 1028; Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702; Wellman v. Railway Co., 83 Mich. 592, 47 N. W. 489; Pennsylvania R. Co. v. Miller, 132 U. S. 75, 10 Sup. Ct. 34.

process of law.<sup>139</sup> Where there is a contract rate, that will prevail;<sup>140</sup> and in the absence of an express contract the usual or customary rate governs,<sup>141</sup> if there is one, and, if not, then a reasonable compensation may be recovered. What is a reasonable compensation is a question of fact.

*Amount—How Calculated.*

The carrier can recover compensation "on that amount only which is put on board, carried throughout the whole voyage, and delivered at the end to the merchant."<sup>142</sup> All three conditions must concur, to entitle the carrier to compensation. So, if grain heats and increases in bulk during transportation, the carrier is not for that reason entitled to increased compensation.<sup>143</sup> On the other hand, he is entitled to no compensation for the carriage of goods lost during transportation, unless a lump sum was to be paid, regardless of the loss of a part of the goods.<sup>144</sup> It is immaterial that the goods have become damaged and worthless en route, provided it was from a cause for which the carrier was not responsible. If he carries them to their destination, and is ready to deliver, he is entitled to his freight.<sup>145</sup> "The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and

<sup>139</sup> *Stone v. Trust Co.*, 116 U. S. 307, 335, 336, 6 Sup. Ct. 334, 388, 1191; *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702.

<sup>140</sup> *Atchison & N. R. Co. v. Miller*, 16 Neb. 661, 21 N. W. 451; *Smith v. Findley*, 34 Kan. 316, 8 Pac. 871; *Baldwin v. Steamship Co.*, 74 N. Y. 125. Cf. *Southern Exp. Co. v. Boullment*, 100 Ala. 275, 13 South. 941.

<sup>141</sup> *Killmer v. Railroad Co.*, 100 N. Y. 395, 3 N. E. 293; *London & N. W. Ry. Co. v. Evershed*, L. R. 3 App. Cas. 1029.

<sup>142</sup> *Gibson v. Sturge*, 10 Exch. 622.

<sup>143</sup> *Gibson v. Sturge*, 10 Exch. 622.

<sup>144</sup> *The Collenberg*, 1 Black, 170; *Price v. Hartshorn*, 44 Barb. 655; *Steelman v. Taylor*, 3 Ware, 52, Fed. Cas. No. 13,349; *The Cuba*, 3 Ware, 260, Fed. Cas. No. 3,458; *Gibson v. Sturge*, 10 Exch. 622; *The Tangier*, 32 Fed. 230; *Gibson v. Brown*, 44 Fed. 98.

<sup>145</sup> *Griswold v. Insurance Co.*, 3 Johns. 321; *Whitney v. Insurance Co.*, 18 Johns. 208, 210; *McGaw v. Insurance Co.*, 23 Pick. 405; *Gulf, C. & S. F. Ry. Co. v. Kemp* (Tex. Civ. App.) 30 S. W. 714; *Steelman v. Taylor*, 3 Ware, 52, Fed. Cas. No. 13,349; *The Cuba*, 3 Ware, 260, Fed. Cas. No. 3,458; *Dakin v. Oxley*, 15 C. B. (N. S.) 646; *Seaman v. Adler*, 37 Fed. 268; *MacLachlan, Ship*, 469, 470.



according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged condition."<sup>146</sup>

*Who Liable—Consignor or Consignee.*

The consignor or shipper is originally liable to the carrier for the hire or freight of the goods, even though he is not the true owner.<sup>147</sup> But prima facie the consignee is the owner of the goods,<sup>148</sup> and is therefore liable for the freight, if he accepts them.<sup>149</sup> From acceptance the law presumes ownership, and implies a contract to pay the charges.<sup>150</sup> But the presumption that the consignee is the owner may be rebutted, in which case, provided the fact was known to the carrier, no contract to pay the freight will be implied by law, though the jury may find, as an inference of fact, from all the circumstances of the case, a contract to do so.<sup>151</sup> It is usual for bills of lading to state that the goods are to be delivered to the consignee or his assigns, he or they paying the freight, in which case the con-

<sup>146</sup> *Dakin v. Oxley*, 15 C. B. (N. S.) 646, 664. The carrier is entitled to full freight, if prevented by the owner from completing the journey. *The Gazelle and Cargo*, 128 U. S. 474, 9 Sup. Ct. 139; *Braithwaite v. Power* (N. D.) 48 N. W. 354.

<sup>147</sup> *Davison v. City Bank*, 57 N. Y. 81; *Holt v. Westcott*, 43 Me. 445; *Strong v. Hart*, 6 Barn. & C. 160; *Tapley v. Martens*, 8 Term R. 451; *Great Western Ry. Co. v. Bagge*, 15 Q. B. Div. 625; *Drew v. Bird*, 1 Moody & M. 156. The shipper named in a bill of lading is liable to the carrier for the freight, although he does not own the goods, and the carrier has waived his lien thereon. *Wooster v. Tarr*, 8 Allen, 270. And see *Union Freight R. Co. v. Winkley*, 159 Mass. 133, 34 N. E. 91.

<sup>148</sup> *Davison v. City Bank*, 57 N. Y. 81; *O'Dougherty v. Railroad Co.*, 1 *Thomp. & C.* 477; *Sweet v. Barney*, 23 N. Y. 335; *Lawrence v. Minturn*, 17 How. 100.

<sup>149</sup> *Davison v. City Bank*, 57 N. Y. 81; *Philadelphia & R. R. Co. v. Barnard*, 3 Ben. 39, Fed. Cas. No. 11,086; *Kemp v. Clark*, 12 Q. B. Div. 617; *Young v. Moeller*, 5 El. & Bl. 755; *Sanders v. Van Zeller*, 4 Q. B. Div. 260; *Cock v. Taylor*, 13 East, 399; *Gates v. Ryan*, 37 Fed. 154; *North-German Lloyd v. Heule*, 44 Fed. 100.

<sup>150</sup> *Abbe v. Eaton*, 51 N. Y. 410; *Merian v. Funck*, 4 Denio, 110; *Davis v. Pattison*, 24 N. Y. 317; *Hinsdell v. Weed*, 5 Denio, 172; *Scalfe v. Tobin*, 3 Barn. & Adol. 523; *Coleman v. Lambert*, 5 Mees. & W. 502.

<sup>151</sup> *Elwell v. Skiddy*, 77 N. Y. 282. Such a contract may be implied from previous course of dealing. *Wilson v. Kymer*, 1 Maule & S. 157.

signee or his assigns, by accepting the goods, become bound to pay the freight.<sup>152</sup> And the fact that the consignor is also liable to pay the freight will not, in such a case make any difference.<sup>153</sup> It matters not, under such a bill of lading, whether the consignee be the owner or not. The law implies a promise on his part to pay the freight.<sup>154</sup> The provision that the consignee or his assigns shall pay the freight has been held to be for the sole benefit of the shipper, and therefore, if the carrier delivers without receiving his freight, thereby waiving his lien, he may nevertheless recover of the consignor.<sup>155</sup>

### *Demurrage.*

Carriers by water usually provide by contract for the payment by the consignee of a certain sum for each day the carrier is detained by reason of the consignee's failing to receive the cargo.<sup>156</sup> This is called "demurrage." So, in the absence of an express contract as to demurrage, a carrier by water may recover for any losses sustained by his detention more than a reasonable time for discharging the cargo.<sup>157</sup> This right exists, however, only in favor of carriers by water. A railroad company, in the absence of contract, has no claim for charges in the nature of demurrage.<sup>158</sup>

The mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights. Owners of vessels have none. Railroads dis-

<sup>152</sup> Hutch. Carr. § 449; Story, Bailm. § 589; *Dougal v. Kemble*, 3 Bing. 383.

<sup>153</sup> Abb. Shipp. (3d Ed.) pt. 3, c. 7; *Dougal v. Kemble*, 3 Bing. 383; *Barker v. Havens*, 17 Johns. 234; *Domett v. Beckford*, 5 Barn. & Adol. 521; *Shepard v. De Bernales*, 13 East. 565.

<sup>154</sup> *Davison v. City Bank*, 57 N. Y. 81.

<sup>155</sup> Hutch. Carr. § 451; *Shepard v. De Bernales*, 13 East, 565.

<sup>156</sup> *Williams v. Theobald*, 15 Fed. 465, 468; *Conard v. Insurance Co.*, 1 Pet. 386, 446; *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588; *Randall v. Lynch*, 2 Camp. 352.

<sup>157</sup> *Huntley v. Dows*, 55 Barb. 310; *Clendaniel v. Tuckerman*, 17 Barb. 184; *Morse v. Pesant*, \*41 N. Y. 16; *Horn v. Bensusan*, 9 Car. & P. 709; *Brouncker v. Scott*, 4 Taunt. 1; *Kell v. Anderson*, 10 Mees. & W. 498.

<sup>158</sup> *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588; *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390, 19 N. W. 451. But see *Hunt v. Railroad Co. (Tex. Civ. App.)* 31 S. W. 523; *Freeman v. Railroad Co.*, 32 Fla. 420, 13 South. 892.

charge cargoes carried by them. Carriers by ship do not, but it is done by the consignee.<sup>159</sup>

**78. DISCRIMINATION**—At common law, common carriers were allowed to make reasonable discriminations in regard to rates charged.

“The leading American decisions which have in recent times passed upon the obligations of railway companies towards the public, in their relation of common carriers, have been uniform, we think, in maintaining, on principles of the common law, irrespective of statutes, that their duty lies in the strictest impartiality in the conduct of their business, and in withholding all privileges or preferences from one customer which are not extended to all.<sup>160</sup> Pierce, in his treatise on the Law of Railroads,<sup>161</sup> deduces from the cases decided the following proposition: ‘A railroad company, being under a public obligation as a common carrier, and being, in a certain sense, a public agent, in consequence of holding by delegation the power of eminent domain, is required to treat the public with equality and fairness. It cannot discriminate in the transportation of persons and merchandise, by giving special privileges to one which it denies to another,<sup>162</sup> or by charging for the same service higher rates to some than to others.<sup>163</sup> This rule is not to be inexorably applied, so as, provided the rate is reasonable for all, to exclude contracts for transportation at a less rate in special cases, where, under the circumstances, the discrimination appears reasonable.’<sup>164</sup>

<sup>159</sup> *Chicago & N. W. R. Co. v. Jenkins*, *supra*.

<sup>160</sup> *Hutch. Carr.* §§ 297-301. See, also, *ante*, p. 327.

<sup>161</sup> Page 498.

<sup>162</sup> *Sandford v. Railroad Co.*, 24 Pa. St. 378; *Audenried v. Railroad Co.*, 68 Pa. St. 370; *New England Exp. Co. v. Maine Central R. Co.*, 57 Me. 188; *McDuffee v. Railroad*, 52 N. H. 430; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365. Common carrier cannot discriminate, in favor of itself or any of its employes, as against other shippers. *Cumberland Valley Railroad Co.'s Appeal*, 62 Pa. St. 218.

<sup>163</sup> *Messenger v. Railroad Co.*, 36 N. J. Law, 407; *Cumberland Valley Railroad Co.'s Appeal*, 62 Pa. St. 218, 230; *Camblos v. Railroad Co.*, 4 Brewst. 563, 622; *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33.

<sup>164</sup> *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Sargent v. Railroad Corp.*, 115

"Hutchinson, in his work on Carriers,<sup>165</sup> in a note, shows that there is a difference of opinion upon the question whether, by common law, the common carrier was bound to charge the same rate for the same service to all parties; and he quotes from Byles, J.,<sup>166</sup> as follows: 'I know no common-law reason why a carrier may not charge less than what is reasonable to one person, or even carry for him free of all charge.'<sup>167</sup> The question was considered in *Fitchburg Railroad Co. v. Gage*.<sup>168</sup> The court said: 'The principle derived from that source [the common law] is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, no

Mass. 416, 422; *Eclipse Towboat Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1; *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292; *McDuffee v. Railroad*, 52 N. H. 430, collecting cases; *Southern Exp. Co. v. St. Louis, I. M. & S. Ry. Co.*, 10 Fed. 210, 869, 3 Am. & Eng. R. Cas. 594, 602. note; *Parker v. Railway Co.*, 7 Man. & G. 253; *Ex parte Benson*, 18 S. C. 38; *Ragan v. Aiken*, 9 Lea, 609; *Johnson v. Railroad Co.*, 16 Fla. 623; *Baxendale v. Railway Co.*, 4 C. B. (N. S.) 63. "There was nothing in the common law to hinder a carrier from carrying for a favored individual at an unreasonably low rate or even gratis. All that the law required was that he should not charge more than was reasonable." Per Blackburn, J., in *Great Western Ry. Co. v. Sutton*, 38 L. J. Exch. 177, 178, L. R. 4 H. L. 226, 237. Discrimination in the making of contracts by a carrier for the carriage of goods, without partiality, is inoffensive. Partiality exists only in cases where advantages are equal, and one party is unduly favored at the expense of another who stands upon an equal footing. *Cleveland, C. C. & I. Ry. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567.

<sup>165</sup> Section 302.

<sup>166</sup> *Baxendale v. Railway Co.*, 4 C. B. (N. S.) 63, 78.

<sup>167</sup> See, also, *Menacho v. Ward*, 27 Fed. 529; *Johnson v. Railroad Co.*, 16 Fla. 623; *Cowden v. Steamship Co.*, 94 Cal. 470, 29 Pac. 873; *Ex parte Benson*, 18 S. C. 38; *Kelly v. Railroad Co.* (Iowa) 61 N. W. 957. But see *Messenger v. Railroad Co.*, 36 N. J. Law, 407; *Scotfield v. Railway Co.*, 43 Ohio St. 571; *Hays v. Pennsylvania Co.*, 12 Fed. 309; *Ragan v. Aiken*, 9 Lea (Tenn.) 609. An agreement by a common carrier to give one shipper a favor and advantage over others by a rebate is illegal at common law. *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 22 Atl. 76. The courts have no power to make freight or passenger tariffs. *Pensacola & A. R. Co. v. State*, 25 Fla. 310, 5 South. 833.

<sup>168</sup> 12 Gray, 393.

wrong can be done, and no cause afforded for complaint.' <sup>160</sup> The author, in the discussion contained in the note, shows that construc-

<sup>160</sup> At common law discrimination in rates must have been fair and reasonable, and founded on grounds consistent with public interest, or it was not permitted. *Hersh v. Railway Co.*, 74 Pa. St. 181; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Fitchburg R. Co. v. Gage*, 12 Gray, 393. A common carrier cannot lawfully make unreasonable charges for his services, or unjust discrimination between his customers. *Cook v. Chicago, R. I. & P. R. Co.* 81 Iowa, 551, 46 N. W. 1080. "The hinge of the question is not found in the single fact of discrimination, for discrimination without partiality is inoffensive, and partiality exists only in cases where advantages are equal, and one party is unduly favored at the expense of another, who stands upon an equal footing. Many English cases support this general doctrine. *Garton v. Railway Co.*, 1 Best & S. 112; *Hozier v. Railway Co.*, 1 Nev. & McN. 27, 24 Law T. 339; *Great Western Ry. Co. v. Sutton*, L. R. 4 H. L. 226, 238; *Ransome v. Railway Co.*, 1 C. B. (N. S.) 437; *Jones v. Railway Co.*, 1 Nev. & McN. 45, 3 C. B. (N. S.) 718; *Oxlade v. Railway Co.*, 1 Nev. & McN. 72, 1 C. B. (N. S.) 454; *Baxendale v. Railway Co.*, 5 C. B. (N. S.) 336; *Bellsdyke Coal Co. v. North British Ry. Co.*, 2 Nev. & McN. 105. The current of judicial opinion in America flows in the general channel marked out and opened by the courts of England. *Bayles v. Railway Co.*, 13 Colo. 181, 22 Pac. 341; *Spofford v. Railroad*, 128 Mass. 326; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Johnson v. Railroad Co.*, 16 Fla. 623; *Ragan v. Aiken*, 9 Lea, 609; *McDuffee v. Railroad*, 52 N. H. 430; *Hersh v. Railway Co.*, 74 Pa. St. 181; *Christie v. Railway Co.*, 94 Mo. 453, 7 S. W. 567; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Toledo, W. & W. Ry. Co. v. Elliott*, 76 Ill. 67; *Erie & Pacific Despatch v. Cecil*, 112 Ill. 180, 185; *Root v. Railroad Co.*, 114 N. Y. 300, 21 N. E. 403; *Killmer v. Railroad Co.*, 100 N. Y. 395, 3 N. E. 293, *Stewart v. Railroad Co.*, 38 N. J. Law, 505; *Union Pac. Ry. Co. v. U. S.*, 117 U. S. 355, 6 Sup. Ct. 772; *Hays v. Pennsylvania Co.*, 12 Fed. 303; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. 37. The cases of *State v. Cincinnati, W. & B. Ry. Co.*, 23 N. E. 928, *Scotfield v. Railway Co.*, 42 Ohio St. 571, 3 N. E. 907, and *Messenger v. Railroad Co.*, 36 N. J. Law, 407, are not entirely out of line with the decisions to which we have referred, although fragmentary expressions, found in some of the opinions, seemingly pass the lines of principle." *Cleveland, C., C. & I. Ry. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159. The important point to every freighter is that the charge shall be reasonable, and a right of action will not exist in favor of any one unless it be shown that unreasonable inequality had been made to his detriment. A reasonable price paid by such a party is not made unreasonable by a less price paid by others. *Bayles v. Railway Co.*, 13 Colo. 181, 22 Pac. 341; *Scotfield v. Railway Co.*, 42 Ohio St. 571, 600; *Christie v. Railway Co.*, 94 Mo. 453, 7 S. W. 567; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Hutch. Carr.* § 302. What is



tion which English courts have placed upon the English railway and canal traffic act of 1854, in regard to preferences in the rates charged

a reasonable charge is ordinarily a question of fact. *Root v. Railroad Co.*, 114 N. Y. 300, 21 N. E. 403. The rate charged one person may be evidence in determining whether the rate charged another is reasonable. *Johnson v. Railroad Co.*, 15 Fla. 623; *Menacho v. Ward*, 27 Fed. 529; *Kelly v. Railway Co.* (Iowa) 61 N. W. 937. "The charging another party too little is not charging you too much." Per Crompton, J., in *Garton v. Railway Co.*, 1 Best & S. 112, 154. As to rebates, see *Cleveland, C., C. & I. R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159; *Root v. Long Island R. Co.*, 114 N. Y. 300, 21 N. E. 403. Discriminations based solely upon the amount of freight shipped are discriminations in favor of capital and contrary to public policy, and therefore void. *Hays v. Pennsylvania Co.*, 12 Fed. 309; *Rothschild v. Railroad Co.*, 15 Mo. App. 242; *Wood, Ry. Law*, 567; *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122; *Nicholson v. Railway Co.*, 1 Nev. & McN. 121; *Greenop v. Railway Co.*, 2 Nev. & McN. 319. A railroad company cannot discriminate in favor of a shipper who is able to furnish a large amount of freight, over one engaged in the same business who is unable to furnish the same quantity,—at least, where both ship in car-load lots. *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311. "The expense of handling, carrying, and storing the smaller amount is much greater, pro rata, than that of the same operations upon the larger amount in one body, and a discrimination in favor of the larger dealers is not inequality, but reasonable equality." *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122. In *Burlington, C. R. & N. Ry. Co. v. Northwestern Fuel Co.*, 31 Fed. 632, a contract in which a railway company agreed to charge a rate of not less than \$2.40 per ton to all persons shipping less than 100,000 tons of coal per annum, and to make a rate of \$1.60 per ton to all persons shipping over 100,000 tons per annum, was held to be an unreasonable discrimination, as tending to create a monopoly, and that it was therefore void. To same effect is *Scodfeld v. Railway Co.*, 43 Ohio St. 571, 3 N. E. 907. In the absence of statute, a common carrier may discriminate in favor of longer distances. *St. Louis, A. & T. H. R. Co. v. Hill*, 14 Ill. App. 570; *Hersh v. Railway Co.*, 74 Pa. St. 188; *Shipper v. Railroad Co.*, 47 Pa. St. 333. Common carriers may discriminate between different classes of goods, where the risk and expense of carrying such classes of goods are different. 1 *Wood, Ry. Law*, 570. A common carrier cannot discriminate against one who refuses to patronize him exclusively. *Menacho v. Ward*, 27 Fed. 529. Discrimination on the ground that the shipper agrees to employ other lines of the company for traffic distinct from the goods in question is unreasonable. *Baxendale v. Railway Co.*, 1 Nev. & McN. 191; *Bellsdyke Coal Co. v. North British Ry. Co.*, 2 Nev. & McN. 105. In *Chicago & A. R. Co. v. People*, 67 Ill. 11, a statute forbidding any discrimination whatever, under any circumstances, whether just or unjust, was held to be unconstitutional.

for carrying. That act has been interpreted to apply to preferences of that character, and construed not to prohibit just and reasonable discriminations in that respect. Certainly the rule of the common law is not more stringent against carriers than the act itself, which was passed in order to limit and restrict them in their dealings with the public. In this connection we will quote some of the comments of the author, made in the note: 'Although the purpose of the act is to prevent, among other things, unreasonable discrimination in rates to the prejudice or disadvantage of particular individuals, it was not, it has been said, to relieve every person from all possible prejudice or disadvantage from any arrangement which might be made by the carrier, if the arrangement was for the benefit of the public at large, for the reasonable increase of the business and profits of the carrier, and was not entered into with a view to the advantage or preference of one party, or disadvantage of the other. \* \* \* So the courts will not interfere if the charge or arrangement will greatly promote the interest of the carrier, without unreasonably prejudicing those who may desire to employ him, or will be beneficial to the community, though disadvantageous to particular individuals. \* \* \* But though the court, when such a question is brought before it under the statute, it is said, will feel great reluctance in interfering with the carrier in the management of his own business, and his interest must be taken into account, yet, if the discrimination made by him subjects others to unreasonable disadvantages, it will interfere, and enjoin the carrier from making such preferences. And so it will if the object of the carrier is not solely his own advantage, but also to give a preference to one individual to the disadvantage of another, or to one locality to the prejudice of another.'"<sup>170</sup>

In other words, if the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in like condition, it may nevertheless lower the charge of another person, if it be to the advantage of the company, not inconsistent with public interest, and based on a sufficient reason.<sup>171</sup> But if the discrimination is unjust, and is intended or has a

<sup>170</sup> *Houston & T. C. Ry. Co. v. Rust*, 58 Tex. 95.

<sup>171</sup> *Ragan v. Aiken*, 9 Lea (Tenn.) 609; *Seafeld v. Railway Co.*, 43 Ohio St. 571, 3 N. E. 907; *Kansas Pac. Ry. Co. v. Bayles*, 19 Colo. 348, 35 Pac. 744; *Cleveland, C., C. & I. R. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159.

tendency to injure another shipper in his business, and destroy his trade by giving to the favored shipper a practical monopoly, it is illegal.<sup>172</sup> Perhaps, as was said in a leading case upon this subject, the doctrine here formulated will reconcile all the cases upon the facts (though not all the judges have said in them), and make them consistent.<sup>173</sup>

In England, by the railway and canal traffic act,<sup>174</sup> and in this

<sup>172</sup> *Burlington, C. R. & N. Ry. Co. v. Northwestern Fuel Co.*, 31 Fed. 652; *Hays v. Pennsylvania Co.*, 12 Fed. 309; *Denver & N. O. R. Co. v. Atchison. T. & S. F. R. Co.*, 15 Fed. 650; *Hersh v. Railway Co.*, 74 Pa. St. 181; *Shipper v. Railroad Co.*, 47 Pa. St. 338; *Chicago & A. R. Co., v. People*, 67 Ill. 11; *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122; *Samuels v. Railroad Co.*, 31 Fed. 57. A mere reduction from an ordinary rate is not necessarily an unjust, and therefore an illegal, discrimination. *Christie v. Railway Co.*, 94 Mo. 453, 7 S. W. 567; *Hays v. Pennsylvania Co.*, 12 Fed. 309. In *Scofield v. Railway Co.*, 43 Ohio St. 571, 3 N. E. 907, a contract to carry for the Standard Oil Company at a rate 10 per cent. below that demanded from all other shippers, in consideration of their shipping all their oil over the carrier's line, was held illegal, as tending to create a monopoly. See also, *Hays v. Pennsylvania Co.*, 12 Fed. 309; *Kinsley v. Railroad Co.*, 37 Fed. 181; *State v. Railway Co.*, 47 Ohio St. 130, 23 N. E. 928; *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311; *Handy v. Railroad Co.*, 31 Fed. 689. A discrimination in rates for transportation of the same class of goods of different shippers under like circumstances is illegal and unreasonable. *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill. 250, 8 N. E. 862; *Root v. Railroad Co.*, 114 N. Y. 300, 21 N. E. 403; *Scofield v. Railway Co.*, 43 Ohio St. 571, 3 N. E. 907; *Messenger v. Railroad Co.*, 36 N. J. Law, 407, 37 N. J. Law, 531; *Bayles v. Railway Co.*, 13 Colo. 181, 22 Pac. 341; *Hutch. Carr.* § 302. A rebate secretly paid by a common carrier to certain shippers is an unjust discrimination against others shipping the same class of goods under the same conditions, and the excessive charge may be recovered back. *Cook v. Railway Co.*, 81 Iowa, 551, 36 N. W. 1080. A railroad will not be permitted to charge one rate of delivery to one warehouse and a different rate to another (*Vincent v. Railroad Co.*, 49 Ill. 33; *Chicago & A. R. Co. v. People*, 67 Ill. 11), nor to refuse altogether to deliver to a certain warehouse (*Chicago & N. W. Ry. Co. v. People*, 56 Ill. 365), or stock yard (*Coe v. Railroad Co.*, 3 Fed. 775); nor to receive and deliver exclusively at one stockyard belonging to another corporation, and charging for the use thereof in addition to the transportation a sum for the benefit of such corporation. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461.

<sup>173</sup> *Scofield v. Railway Co.*, 43 Ohio St. 571, 3 N. E. 907.

<sup>174</sup> 17 & 18 Vict. c. 31 (1845). The following are the chief cases, dealing with preferential tariffs under the act, which have been decided to amount

country, by the interstate commerce act and the statutes of many of the states, all unreasonable and unjust discrimination in rates is prohibited.<sup>175</sup>

to undue preferences: *Ransome v. Railway Co.*, 26 Law J. C. P. 91, 1 C. B. (N. S.) 437 (to favor a customer in competition with other traders); *Oxlade v. Railway Co.*, 26 Law J. C. P. 129, 1 C. B. (N. S.) 454 (to introduce a particular traffic into a district); *Harris v. Railway Co.*, 27 Law J. C. P. 162, 3 C. B. (N. S.) 693 (to buy off a rival scheme); *Evershed v. Railway Co.*, 48 Law J. Q. B. 22, 3 App. Cas. 1029 (to enable the company to compete with other carriers); *Baxendale v. Railway Co.*, 28 Law J. C. P. 69, 5 C. B. (N. S.) 309 (to person engaging to use other lines of the company); *Baxendale v. Railway Co.*, 28 Law J. C. P. 81, 5 C. B. (N. S.) 336 (to accompany itself in a separate trade). *Redm. Ry. Carr. c. 3.*

<sup>175</sup>A maximum rate may be fixed by legislation. *Munn v. Illinois*, 94 U. S. 113; 6 Myer, Fed. Dig. 717; *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. 832; *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.*, 25 W. Va. 324. Such legislation by a state can only apply to shipments wholly within the state. *Carton v. Railroad Co.*, 59 Iowa, 148, 13 N. W. 67; *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4. Where a schedule of rates for railroad charges, fixed by legislative authority, will not pay the cost of necessary service, appliances, and the repair thereof, and interest on bonds, and then leave something for dividends, its enforcement will be enjoined. *Chicago & N. W. R. Co. v. Dey*, 2 Interst. Commerce Com. R. 325, 35 Fed. 866; *Pensacola & A. R. Co. v. State*, 2 Interst. Commerce Com. R. 522, 25 Fla. 310, 5 South. 833. Statutes prohibiting unjust discriminations have been held to be merely declaratory of the common law. *Shipper v. Railroad Co.*, 47 Pa. St. 338, 340; *Scofield v. Railway Co.*, 43 Ohio St. 571, 3 N. E. 907; *Messenger v. Railroad Co.*, 36 N. J. Law, 407, 412. But in *Great Western Ry. Co. v. Sutton*, L. R. 4 H. L. 226, 238, Blackburn, J., said: "I think it appears, from the preamble of the ninetieth section of the railways clauses consolidation act (1845), that the legislature was of opinion that the changed state of things, arising from the general use of railways, made it expedient to impose an obligation on railway companies, acting as carriers, beyond what is imposed on a carrier at common law. And, if this be borne in mind, I think the construction of the proviso for equality is clear, and is that the defendants may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that, if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies, acting as carriers, on their line, must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common



**79. LIEN**—A common carrier has a lien for his proper charges on goods received from one who had authority to deliver them for transportation.

To enforce the payment of charges, a carrier has several remedies. The compensation may be demanded in advance.<sup>176</sup> If this is not done, the carrier cannot maintain an action for his charges until the transportation is completed and the carrier's contract performed.<sup>177</sup>

law on ordinary carriers, as being more than was reasonable. The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less is only material as evidence, for the jury, tending to prove that the reasonable charge was the smaller one. When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not. It is enough to show that the company carried for some other person or class of persons at a lower charge, during the period throughout which the party complaining was charged more under the like circumstances." For instances of undue preference under the English act, see *Baxendale v. Railway Co.*, 11 C. B. (N. S.) 787. A company is guilty of undue preference when they favor any particular person in a delivery of goods. *Parkinson v. Railway Co.*, 40 Law J. C. P. 222, L. R. 6 C. P. 554; *Fishbourne v. Railway Co.*, 19 Sol. J. 859. Where a company closed their offices at a certain hour, and refused to receive goods thereafter from the public generally, but continued to receive goods from a particular individual, it is an undue preference. *Garton v. Railway Co.*, 30 Law J. Q. B. 278, 1 Best & S. 112; *Id.*, 28 Law J. C. P. 306, 6 C. B. (N. S.) 639. Also, where a company admitted into their stations their own vans with goods, to be forwarded that night, at a later hour than they admitted those of other persons. *Palmer v. Railway Co.*, 40 Law J. C. P. 133, L. R. 6 C. P. 194. And quære whether the railway company would have been justified in giving such preference to themselves, to the exclusion of other carriers, if it were necessary, in order to enable the general public to have the benefit of sending late parcels. *Id.* And see *Palmer v. Railway Co.*, 35 Law J. C. P. 289, L. R. 1 C. P. 588.

<sup>176</sup> *Camden & A. R. Co. v. Burke*, 13 Wend. 611; *Wyld v. Pickford*, 8 Mees. & W. 442; *Randall v. Railroad Co.*, 108 N. C. 612, 13 S. E. 137 (by statute). But see *Baltimore & O. R. Co. v. Adams Exp. Co.*, 22 Fed. 404. See, also, ante, p. 326.

<sup>177</sup> *Lane v. Penniman*, 4 Mass. 91; *Brittan v. Barnaby*, 21 How. 527; *Certain Logs of Mahogany*, 2 Sumn. 589, Fed. Cas. No. 2,559; *Andrew v. Morrhouse*, 5 Taunt. 435; *Gibson v. Sturge*, 10 Exch. 622; *Mashiter v. Buller*, 1 Camp. 84; *Clark v. Masters*, 1 Bosw. 177; *Barns v. Marshal*, 8 Q. B. 785, 21 Law J. Q. B. 388.



After such performance the carrier may sue either the consignor or the consignee.<sup>178</sup> But this is not necessary, since the goods may be held as security for the charges due; that is, the carrier has a lien to secure his compensation.

The lien of the carrier for charges for carriage of the specific articles is prior to the rights of the vendor or of the vendee, or the creditors of either,\* and the carrier may insist upon retaining possession until those charges are paid;<sup>179</sup> and an officer holding process against the vendee may lawfully advance these charges to the carrier on taking possession of the goods, and, having so advanced them, is substituted to all the carrier's rights of possession as security therefor.<sup>180</sup> The consignee has a right to examine the goods before paying the freight.<sup>181</sup>

#### *On What Goods.*

A common carrier's lien will attach to any kind of goods that are carried. Thus, there is a lien on baggage.<sup>182</sup> A carrier of passengers being responsible, as a common carrier, for the baggage of a passenger, when carried on the same conveyance as the owner thereof, and the transportation of the baggage and the risk incurred by the carrier being a part of the service for which the fare is charged,<sup>183</sup> the carrier has a lien on the baggage that a passenger carries with him.<sup>184</sup> But this lien does not extend to the clothing or other personal furnishings or conveniences of the passenger, in his immediate use or actual possession.<sup>185</sup> A carrier has a lien for charges on

<sup>178</sup> See ante, p. 333.

\* See *Cooley v. Railway Co.*, 53 Minn. 327, 55 N. W. 141.

<sup>179</sup> *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. St. 485, 17 Atl. 671; *Potts v. Railroad Co.*, 131 Mass. 455; *Rucker v. Donovan*, 13 Kan. 251; *Newhall v. Vargas*, 15 Me. 314; *Oppenheim v. Russell*, 3 Bos. & P. 42; *Morley v. Hay*, 3 Man. & R. 396; *Pennsylvania Steel Co. v. Railroad Co.*, 94 Ga. 636, 21 S. E. 577.

<sup>180</sup> *Rucker v. Donovan*, 13 Kan. 190; *Potts v. Railroad Co.*, 131 Mass. 455.

<sup>181</sup> *Brittan v. Barnaby*, 21 How. 127.

<sup>182</sup> See post, p. 377.

<sup>183</sup> See post, p. 377.

<sup>184</sup> *Overt. Liens*, § 142; *Thomp. Carr.* 524, § 11; *Ang Carr.* § 375; 2 *Ror. R. R.* 1003, § 11.

<sup>185</sup> *Ramsden v. Railroad Co.*, 104 Mass. 117, 121; *Roberts v. Koehler*, 30 Fed. 94.

property of the United States, as well as on the property of an individual.<sup>186</sup> Although the rule is otherwise in England,<sup>187</sup> in this country a carrier has no lien on goods delivered for transportation by one who is a wrongdoer, and has no authority to deliver the goods to the carrier.<sup>188</sup> This is placed on the ground that a common carrier is bound to receive and carry goods only when offered for carriage by their owner or his authorized agent, and then only upon payment for the carriage in advance, if required. If a common carrier obtains possession of goods wrongfully, or without the consent of the owner, express or implied, and, on demand, refuses to deliver them to the owner, such owner may bring replevin for the goods, or trover for their value. To justify a lien upon goods for their freight, the relation of debtor and creditor must exist between the owner and the carrier, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien.<sup>189</sup> But it seems to be the rule of common sense, and supported by the weight of authority, that when the owner has, by his own voluntary acts, clothed the sender with an apparent authority to act for him, then the carrier has a right to look to the owner for his reasonable charges, and to hold a lien on the goods for the charges; and, in judging of the authority, we should apply the same principles of evidence that are applied to cases of agency generally.<sup>190</sup> Thus, when the freight is earned in good faith, under

<sup>186</sup> *Union Pac. R. Co. v. U. S.*, 2 Wyo. 170; *U. S. v. Wilder*, 3 Sumn. 308, Fed. Cas. No. 16,694; *The Davis*, 10 Wall. 15. Contra, *Dufolt v. Gorman*, 1 Minn. 301 (Gil. 234).

<sup>187</sup> *Hutch. Carr.* (2d Ed.) § 489; *Redm. Ry. Carr.* (2d Ed.) 84; *Yorke v. Grenaugh*, 2 Ld. Raym. 866, 867.

<sup>188</sup> *Van Buskirk v. Purinton*, 2 Hall, 601; *Collman v. Collins*, Id. 609; *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Robinson v. Baker*, 5 Cush. (Mass.) 137; *Stevens v. Railroad Co.*, 8 Gray (Mass.) 262; *Clark v. Railroad Co.*, 9 Gray (Mass.) 231; *Gilson v. Gwinn*, 107 Mass. 126; *Bassett v. Spofford*, 45 N. Y. 387; *Marsh v. Railway Co.*, 3 McCrary, 236, 9 Fed. 873. Common carrier, taking property from person not authorized to direct its shipment, has no lien thereon for his services, and no right to retain the property. *Pingree v. Detroit, L. & N. R. Co.*, 66 Mich. 143, 33 N. W. 298. One who carries property for the convenience and at the request of a bailee thereof has no lien thereon for services, as against owner. *Gilson v. Gwinn*, 107 Mass. 126.

<sup>189</sup> *Fitch v. Newberry*, 1 Doug. (Mich.) 1.

<sup>190</sup> *Vaughan v. Railroad Co.*, 13 R. I. 578; *Schneider v. Evans*, 25 Wls. 241,

a contract of transportation made with an agent of the owner, who, according to the usages of business, is clothed with apparent authority by his principal, then the charges for freight will constitute a valid lien upon the property, although the agent, by an accidental or intentional departure from his instructions, sends the goods by a route not intended, or to the wrong place.<sup>191</sup> The rule is the same whenever goods are delivered to a carrier by one whom the owner of the goods has clothed with the indicia of title; as, when an owner of goods delivers them to a carrier to be transported over his route, and thence over the route of a succeeding carrier, or the routes of several successive carriers, he makes the carrier to whom he delivers them his forwarding agent, for whose acts in the execution of that agency he is himself responsible. And therefore, if the several successive carriers carry the goods according to the directions which are given by the forwarding agents, they act under the authority of the owner, and cannot, in any sense, be considered as wrongdoers, although they are carried to a place to which he did not intend that they should be sent. And in such case the last carrier will be entitled to a lien upon the goods,<sup>192</sup> unless there was notice of the directions given to the first carrier. If there was notice, there is no right to compensation, and consequently no lien.<sup>193</sup>

265; *Mallory v. Burrett*, 1 E. D. Smith (N. Y.) 234. See, also, *York Co. v. Central R. R.*, 3 Wall. 107.

<sup>191</sup> *Whitney v. Beckford*, 105 Mass. 267.

<sup>192</sup> *Briggs v. Railroad Co.*, 6 Allen (Mass.) 246; *Stevens v. Railroad Co.*, 8 Gray (Mass.) 262, 266; *Vaughan v. Railroad Co.*, 13 R. I. 578; *Price v. Railway Co.*, 12 Colo. 402, 21 Pac. 188; *Patten v. Railway Co.*, 29 Fed. 590; *Bird v. Georgia R. R.*, 72 Ga. 655; *Snow v. Railway Co.* (Ind. Sup.; Jan. 4, 1887) 9 N. E. 702. But see *Denver & R. G. R. Co. v. Hill*, 13 Colo. 35, 21 Pac. 914.

<sup>193</sup> *Bird v. Georgia R. R.*, 72 Ga. 655; *Marsh v. Railway Co.* (Jan. 11, 1882) 9 Fed. 873; *Patten v. Railway Co.*, 29 Fed. 590. Cf. *Moses v. Railroad Co.*, 5 Wash. St. 595, 32 Pac. 488, 1000. A carrier which received goods from another carrier, with the knowledge that the shipper has directed shipment by the first carrier over a different connecting route, has no carrier's lien upon the goods, either for its own charges, or for charges advanced to the first carrier; and proof of a contract between the two carriers to systematically disregard shipping directions obviates the necessity of specific proof of different shipping directions in the case in suit. *Denver & R. G. R. Co. v. Hill*, 13 Colo. 35, 21 Pac. 914.

If goods belonging to different owners are shipped by one bill of lading, the carrier cannot hold the goods of one for the charges upon the goods of the other. Each owner is entitled to his goods on the payment of the appropriate charges.<sup>194</sup>

*For What Charges.*

A carrier's lien covers all charges rightfully due for transportation of the goods on which the lien exists.<sup>195</sup> It covers also charges for freight which the carrier has advanced to preceding carriers,<sup>196</sup> unless the last of the connecting carriers had notice from the bill of lading, or otherwise, that the other carriers had been prepaid.<sup>197</sup> When justified by a custom or usage of trade, a carrier may advance other charges, such as those for storage and forwarding.<sup>198</sup> A carrier's lien on baggage is held to cover charges for carrying the owner as a passenger.<sup>199</sup> The lien does not, however, cover charges not connected with carrying the goods;<sup>200</sup> for instance, charges for storage,<sup>201</sup>

<sup>194</sup> Hale v. Barrett, 26 Ill. 195.

<sup>195</sup> Barker v. Havens, 17 Johns. (N. Y.) 234; Clarkson v. Edes, 4 Cow. (N. Y.) 470; Langworthy v. Railroad Co., 2 E. D. Smith (N. Y.) 195; Western Transp. Co. v. Hoyt, 69 N. Y. 230; Bowman v. Hilton, 11 Ohio, 303; Wilson v. Railway, 56 Me. 60; Lickbarrow v. Mason, 2 Term R. 63. And see Bacharach v. Freight Line, 133 Pa. St. 414, 19 Atl. 409.

<sup>196</sup> Potts v. New York & N. E. R. Co., 131 Mass. 455; Briggs v. Railroad Co., 6 Allen (Mass.) 246; Crossan v. Railroad Co., 149 Mass. 196, 21 N. E. 367; Galena & C. U. R. Co. v. Rae, 18 Ill. 488; Union Exp. Co. v. Shoop, 85 Pa. St. 325; Schneider v. Evans, 25 Wis. 241; White v. Vann, 6 Humph. (Tenn.) 70; Wells v. Thomas, 27 Mo. 17; Georgia Railroad & Banking Co. v. Murrah, 85 Ga. 343, 11 S. E. 779; Bird v. Railroad, 72 Ga. 655; Knight v. Railroad Co., 13 R. I. 572; Wolf v. Hough, 22 Kan. 659; Travis v. Thompson, 37 Barb. (N. Y.) 236.

<sup>197</sup> Marsh v. Railway Co., 3 McCrary, 236, 9 Fed. 873.

<sup>198</sup> Bissell v. Price, 16 Ill. 408; White v. Vann, 6 Humph. (Tenn.) 70. But see The Virginia v. Kraft, 25 Mo. 76.

<sup>199</sup> Roberts v. Koehler, 30 Fed. 94.

<sup>200</sup> The Virginia v. Kraft, 25 Mo. 76; Lambert v. Robinson, 1 Esp. 119. The lien does not cover damages for breach of a collateral contract. Birley v. Gladstone, 3 Maule & S. 205; Gray v. Carr, L. R. 6 Q. B. 522; Phillips v. Rodie, 15 East, 547. Or for repairs on an engine. Kimmar v. Railway Co., 19 Law T. (N. S.) 387.

<sup>201</sup> The Virginia v. Kraft, 25 Mo. 76; Lambert v. Robinson, 1 Esp. 119.

for demurrage,<sup>202</sup> or port charges.<sup>203</sup> The carrier's lien for charges is a special, not a general, lien; that is, the carrier cannot hold goods for a general balance of account.<sup>204</sup> A right to a general lien may be given by express contract, or by established usage.<sup>205</sup> Still, such a lien would not be effectual against the consignor's right to stop the goods in transitu.<sup>206</sup> But the whole lien attaches to each and every part of the goods subject to it. If not discharged or waived, it remains attached to whatever part of the property may remain within the possession of the carrier.<sup>207</sup>

### *Waiver of Lien.*

A delivery of part of the property does not necessarily discharge the lien, either in whole or pro tanto. It releases the part delivered from the lien, but does not discharge the part remaining from the burden of the whole lien, unless it was the intention of the par-

<sup>202</sup> East Tennessee, V. & G. R. Co. v. Hunt, 15 Lea (Tenn.) 261; Crommelin v. Railroad Co., \*43 N. Y. 90; Log, etc., R. Co. v. Jenkins, 9 Am. & Eng. Ry. Cas. 113; Falkenburg v. Clark, 11 R. I. 278. The admiralty law, however, gives such a lien. Moody v. Five Hundred Thousand Laths, 2 Fed. 607; Donaldson v. McDowell, 1 Holmes, 290, Fed. Cas. No. 3,985; The Hyperion's Cargo, 2 Lowell, 93, Fed. Cas. No. 6,987. See ante, p. 334.

<sup>203</sup> Faith v. East India Co., 4 Barn. & Ald. 630. A railway carrier has been held to have no lien for cartage at the terminal station. Richardson v. Rich, 104 Mass. 156. Where carrier by water, after landing goods at wharf in city to which they are consigned, voluntarily assumes delivery of them to consignee at his place of business, no lien for cartage arises. Id.

<sup>204</sup> Leonard's Ex'rs v. Winslow, 2 Grant. Cas. (Pa.) 139; Bacharach v. Freight Line, 133 Pa. St. 414, 19 Atl. 409; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 17 Atl. 671; Bartlett v. Caruley, 6 Deur. (N. Y.) 194; Buskirk v. Purinton, 2 Hall, 601; Collman v. Collins, Id. 609; Rushforth v. Hadfield, 6 East, 519; Butler v. Woolcott, 2 Bos. & P. (N. R.) 64; Richardson v. Goss, 3 Bos. & P. 119.

<sup>205</sup> Kirkman v. Shawcross, 6 Term R. 14; Wright v. Snell, 5 Barn. & Ald. 350.

<sup>206</sup> Potts v. New York & N. E. R. Co., 131 Mass. 455; Farrell v. Railroad Co., 102 N. C. 390, 9 S. E. 302; Oppenheim v. Russell, 3 Bos. & P. 42; Jackson v. Nichol, 7 Scott, 577, 5 Bing. N. C. 508, 518. Cf. Pennsylvania Steel Co. v. Georgia Railroad & Banking Co., 94 Ga. 636, 21 S. E. 577.

<sup>207</sup> Ware River R. Co. v. Vibbard, 114 Mass. 447; Lane v. Railroad Co., 14 Gray (Mass.) 143; New Haven & Northampton Co. v. Campbell, 128 Mass. 104; Potts v. Railroad Co., 131 Mass. 455.



ties to do so.<sup>208</sup> And this is ordinarily a question of fact, for the jury.<sup>209</sup> An unconditional delivery of all the goods is a waiver of the lien.<sup>210</sup> A delivery may be made under an agreement that the lien shall not be waived, and this agreement will be valid, as against the consignee.<sup>211</sup> A refusal to deliver the goods for some other reason than that the charges are not paid is a waiver of the carrier's lien.\* Thus, if a person have a lien on goods, for the price of hauling them to a place of deposit, his subsequently claiming them as his own, and refusing, on that ground, to deliver them to the owner, is a waiver of the lien.<sup>212</sup> If a delivery of the goods is obtained by fraud, there is no waiver of the lien.<sup>213</sup> A waiver may be implied from the terms of payment, as when the payment of the transportation charges is to be at a time after the delivery,<sup>214</sup> or from provisions in the bill of lading or charter party inconsistent with the existence of a lien.<sup>215</sup>

<sup>208</sup> *Lane v. Railroad Co.*, 14 Gray (Mass.) 143; *New Haven & Northampton Co. v. Campbell*, 128 Mass. 104; *New York Cent. & H. R. R. Co. v. Davis* (Sup.) 34 N. Y. Supp. 206; *Boggs v. Martin*, 13 B. Mon. (Ky.) 239; *Pennsylvania Steel Co. v. Georgia Railroad & Banking Co.*, 94 Ga. 636, 21 S. E. 577; *Sodergren v. Flight*, cited 6 East, 622.

<sup>209</sup> *New Haven & Northampton Co. v. Campbell*, 128 Mass. 104.

<sup>210</sup> *Bigelow v. Heaton*, 4 Denio (N. Y.) 496, 6 Hill (N. Y.) 43; *Geneva, I. & S. R. Co. v. Sage*, 35 Hun, 95; *Sears v. Wills*, 4 Allen, 212; *Bailey v. Quint*, 22 Vt. 474; *Reineman v. Railroad Co.*, 51 Iowa, 338, 1 N. W. 619.

<sup>211</sup> *The Eddy*, 5 Wall. 481; *Bags of Linseed*, 1 Black (U. S.) 108. An uncommunicated intention of the carrier that the lien shall not be waived is ineffectual. *The Tan Bark Case*, 1 Brown, Adm. 151, Fed. Cas. No. 13,742.

\* Carrier waives his right to detain goods for freight, when he puts his refusal to deliver upon the ground that they are not in his possession at the place where the demand is duly made. *Adams Exp. Co. v. Harris*, 120 Ind. 73, 21 N. E. 340.

<sup>212</sup> *Picquet v. McKay*, 2 Blackf. (Ind.) 465. And see *Adams Exp. Co. v. Harris*, 120 Ind. 73, 21 N. E. 340.

<sup>213</sup> *Bigelow v. Heaton*, 6 Hill (N. Y.) 43; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248; *Ash v. Putnam*, 1 Hill (N. Y.) 302; *One Hundred and Fifty-One Tons of Coal*, 4 Blatchf. 368, Fed. Cas. No. 10,520; *Bristol v. Wilsmore*, 1 Barn. & C. 514.

<sup>214</sup> *The Bird of Paradise*, 5 Wall. 545; *Chandler v. Belden*, 18 Johns. (N. Y.) 157; *Alsager v. St. Katherine Dock Co.*, 14 Mees. & W. 794. But for cases where the facts have been held not to show a waiver of the lien, see *The*

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<sup>215</sup> *Raymond v. Tyson*, 17 How. 53.

*Assignment of Lien.*

A carrier's lien is a personal privilege, and cannot be assigned.<sup>216</sup> One coming into possession of the goods wrongfully cannot claim the benefit of the lien, against the owner, though he has paid the charges on the goods.<sup>217</sup> But the carrier may hand the goods over to a warehouseman, to be stored until the charges are paid, without losing his lien. In such case the warehouseman holds the goods as agent of the carrier.<sup>218</sup>

*Discharge and Set-Off.*

On the analogy of other liens on personal property, a carrier's lien is discharged by a tender of the amount due.<sup>219</sup> The consignee being permitted to set off against the carrier's claim for freight any damages he has suffered,<sup>220</sup> it follows that the carrier cannot hold the goods, under his lien, where the damage is equal to or greater than the amount of the charges. This is for the reason that the carrier's lien is coextensive with and dependent upon his right to recover compensation.<sup>221</sup>

Volunteer, 1 Sumn. 551, Fed. Cas. No. 16,991; Certain Logs of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2,559; The Kimball, 3 Wall. 37; Pinney v. Wells, 10 Conn. 104; Howard v. Macondray, 7 Gray (Mass.) 516; Clarkson v. Edes, 4 Cow. (N. Y.) 470; Tate v. Meek, 8 Taunt. 280; Tambaco v. Simpson, 19 C. B. (N. S.) 453; Brown v. Tanner, 3 Ch. App. 597; Crawshay v. Homfray, 4 Barn. & Ald. 50; Neish v. Graham, 8 El. & Bl. 505. Lien for freight and charges is lost if goods are delivered to consignee, upon his note therefor, and is not revived if carrier or his agent afterwards accidentally obtains possession of them. Hale v. Barrett, 26 Ill. 195.

<sup>216</sup> Hutch. Carr. (2d Ed.) § 493; Ames v. Palmer, 42 Me. 197. Contra. Everett v. Coffin, 6 Wend. 603.

<sup>217</sup> Lempiere v. Pasley, 2 Term R. 485; Dewell v. Moxon, 1 Taunt. 391. And see Ames v. Palmer, 42 Me. 197; Everett v. Saltus, 15 Wend. 474.

<sup>218</sup> Western Transportation Co. v. Barber, 56 N. Y. 544; Compton v. Shaw, 1 Hun, 441; Alden v. Carver, 13 Iowa, 253; Brittan v. Barnaby, 21 How. 527; The Eddy, 5 Wall. 481.

<sup>219</sup> Hutch. Carr. (2d Ed.) § 492; Scott v. Railroad Co., 57 Mo. App. 345.

<sup>220</sup> Gleadell v. Thomson, 56 N. Y. 194; Bartram v. McKee, 1 Watts (Pa.) 39; Leech v. Baldwin, 5 Watts (Pa.) 446; Edwards v. Todd, 1 Seam. (Ill.) 462; Snow v. Carruth, 1 Spr. 324, Fed. Cas. No. 13,144.

<sup>221</sup> Dyer v. Railroad Co., 42 Vt. 441; Humphreys v. Reed, 6 Whart. (Pa.) 435; Ewart v. Kerr, Rice (S. C.) 203; Miami Powder Co. v. Port Royal & W. C. Ry. Co., 38 S. C. 78, 16 S. E. 339.

*Sale under Lien.*

At common law a carrier who has a lien on goods for the freight earned in transporting them, or for sums paid for freight earned by preceding carriers thereof, has no right to sell the goods to enforce the lien.<sup>222</sup> If a carrier who has a lien wrongfully sells the goods, he is liable to an action for conversion;<sup>223</sup> and the measure of damages is the market value of the goods, deducting the amount of the lien.<sup>224</sup>

A sale can be made only by a proceeding to foreclose the lien, and under a decree of sale so obtained.<sup>225</sup> But now, by statutes in nearly all the states, a carrier is given power to sell goods held under the lien for charges, after holding them a certain length of time.<sup>226</sup>

<sup>222</sup> *Briggs v. Railroad Co.*, 6 Allen (Mass.) 246; *Lecky v. McDermott*, 8 Serg. & R. (Pa.) 500; *Indianapolis & St. L. R. Co. v. Herndon*, 81 Ill. 143; *Hunt v. Haskell*, 24 Me. 339; *Sullivan v. Park*, 33 Me. 438; *Rankin v. Packet Co.*, 9 Heisk. (Tenn.) 564; *Gracie v. Palmer*, 8 Wheat. 605; *Lickbarrow v. Mason*, 6 East, 22.

<sup>223</sup> *Id.*

*End Thus Feb 6th*

<sup>224</sup> *Briggs v. Railroad Co.*, 6 Allen (Mass.) 246.

<sup>225</sup> *Hunt v. Haskell*, 24 Me. 339; *Rankin v. Packet Co.*, 9 Heisk. (Tenn.) 564; *Fox v. McGregor*, 11 Barb. 41.

<sup>226</sup> Alabama, Code 1876, § 2140. Arizona, Comp. Laws 1877, c. 86, § 4. California, Civ. Code, §§ 2144, 2191. Colorado, Gen. St. 1883, §§ 2119-2125. Connecticut, Gen. St. 1875, p. 365. Dakota, Code 1883, §§ 1228-1228b. Delaware, Rev. Code 1874, p. 667. Georgia, Code 1882, § 2084a. Illinois, Starr & C. Ann. St., c. 141, § 1. Indiana, Rev. St. 1881, § 2900 (Rev. St. 1894, § 3294). Iowa, Rev. Code 1886, §§ 2177, 2178. Kansas, Gen. St. 1889, art. 3665. Louisiana, Rev. Civ. Code 1882, arts. 3224, 3226; Civ. Code 1884, § 2873. Maine, Rev. St. 1883, c. 62, §§ 8-10. Maryland, Rev. Code 1878, art. 67, c. 20, §§ 1-3. Massachusetts, Pub. St. 1882, c. 96, § 6. Michigan, 3 How. Ann. St. § 3327. Minnesota, Gen. St. 1878, p. 875, §§ 16, 17 (Gen. St. 1894, § 6248). Missouri, Rev. St. 1879, §§ 6277, 6278. Mississippi, Rev. Code 1880, § 1055. Nebraska, Comp. St. 1887, p. 733, c. 92, § 3. Nevada, Gen. St. 1885, §§ 4964-4969. New Jersey, Revision 1709-1887, p. 593. New Mexico, Comp. Laws 1884, § 2682. New York, Rev. St. (8th Ed.) p. 2520. North Carolina, Code 1883, § 1985. Ohio, Rev. St. 1892, § 3223. Oregon, Hill's Ann. Laws 1887, §§ 3684, 3685. Pennsylvania, Brightly, Purd. Dig. p. 266, § 7. Rhode Island, Pub. St. c. 139, § 5. South Carolina, Rev. St. 1872, p. 398, c. 76. Tennessee, Code 1884, § 2790. Texas, Sayles' Civ. St. art. 285. Utah, Comp. Laws 1888, §§ 2958-2960. Vermont, Rev. Laws 1880, c. 184, § 4063-4067. Washington, Code 1881-83, § 1982. Wisconsin, Rev. St. 1878, § 1638. Wyoming, Rev. St. 1887, §§ 1471-1474.

## SAME—LIABILITY FOR LOSS OR DAMAGE.

80. Common carriers are liable for loss or damage to the goods shipped, either—

- (a) As insurers (p. 351), or
- (b) As ordinary bailees for hire (p. 401).

## SAME—LIABILITY FOR LOSS OR DAMAGE—AS INSURERS.

81. Common carriers are insurers of goods carried in that capacity against all losses or damage, except those caused by:

- EXCEPTIONS**—(a) The act of God (p. 356).  
 (b) The public enemy (p. 364).  
 (c) The act of the shipper (p. 365).  
 (d) Public authority (p. 367).  
 (e) The inherent nature of the goods (p. 368).

82. Even where the loss is caused by a peril against which common carriers are not insurers, they are nevertheless liable, if they fail to use reasonable care and diligence to avoid all perils, including the excepted perils.<sup>227</sup>

In the absence of contract to the contrary with the customer, a common carrier is, by common law, an insurer of the goods intrusted to him; his warranty being safely and securely to carry and deliver.<sup>228</sup> In other words, he impliedly undertakes to deliver the goods in the condition in which he received them.<sup>229</sup> If goods de-

<sup>227</sup> See post, p. 401, "Liability as Ordinary Bailees."

<sup>228</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909; *Forward v. Pittard*, 1 Term R. 27; *Fish v. Chapman*, 2 Ga. 349; *Williams v. Grant*, 1 Conn. 487; *Merritt v. Earle*, 29 N. Y. 115; *Parsons v. Hardy*, 14 Wend. 215; *Colt v. McMechen*, 6 Johns. 160; *Wood v. Crocker*, 18 Wis. 345; *Welsh v. Railroad Co.*, 10 Ohio St. 65; *Parker v. Flagg*, 26 Me. 181; *Blumenthal v. Brainerd*, 38 Vt. 402; *Hooper v. Wells*, 27 Cal. 11; *Adams Exp. Co. v. Darnell*, 31 Ind. 20; *Gulf, C. & S. F. Ry. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191; *Daggett v. Shaw*, 3 Mo. 264.

<sup>229</sup> Per *Pollock, C. B.*, in *Higginbotham v. Railroad Co.*, 10 Wkly. Rep. 358.

livered to a carrier do not arrive at their destination, or, when delivered, they are not the same, in bulk or condition, as when received by the carrier, this is a *prima facie* breach of his warranty, for which he is liable. In an action for loss of goods, it is sufficient evidence of nondelivery to show that the goods never reached the consignee.<sup>230</sup> So evidence that the weight or amount of goods delivered to the consignee is less than the weight or amount of goods delivered to the carrier is sufficient, *prima facie*, to charge the latter for the deficiency, or to call on him to show that it did not arise from his negligence.<sup>231</sup> Proof that the goods were in a proper condition when received by the company, and were damaged when delivered, is sufficient to charge the company.<sup>232</sup>

As stated in the black-letter text, there are certain perils or risks against which a carrier does not insure. These excepted perils are the act of God, the public enemy, the act of the shipper, public authority, and the inherent nature of the goods. If it can be shown that the loss or injury arose from one of these excepted perils, the carrier is *prima facie* not liable. Nothing but one of these excepted perils, however, will excuse the carrier when goods are lost or injured.<sup>233</sup> So that at common law the carrier would be liable, though the goods are stolen, even by force, destroyed by accidental fire, or injured through the wrongful acts of third parties.<sup>234</sup> The above-mentioned exceptions, however, limit the liability, and not

<sup>230</sup> *Gilbart v. Dale*, 5 Adol. & E. 543; *Griffiths v. Lea*, 1 Car. & P. 110.

<sup>231</sup> *Hawkes v. Smith*, Car. & M. 72.

<sup>232</sup> *Higginbotham v. Railroad Co.*, 10 Wkly. Rep. 358. Where the freight injured is live stock or perishable property, proof of the injury is insufficient. "The shipper must also show some 'injurious accident,' or some injury to the thing shipped, which could not have been the result of its inherent nature or defects, or which stimulated or accelerated the injury arising out of such inherent nature or defects." *Hutch. Carr.* § 768a; *Pennsylvania R. Co. v. Rairor-don*, 119 Pa. St. 577, 13 Atl. 324; *Hussey v. The Saragossa*, 3 Woods, 380, Fed. Cas. No. 6,949. But see *The America*, 8 Ben. 491, Fed. Cas. No. 283; *Lindsley v. Railway Co.*, 36 Minn. 539, 33 N. W. 7; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Columbus & W. Ry. Co. v. Kennedy*, 78 Ga. 646, 3 S. W. 267.

<sup>233</sup> *Davis v. Wabash, St. L. & P. R. Co.*, 89 Mo. 340, 1 S. W. 327.

<sup>234</sup> *Forward v. Pittard*, 1 Term R. 27; *Hyde v. Navigation Co.*, 5 Term R. 389; *Gosling v. Higgins*, 1 Camp. 451. It has sometimes been thought that "inevitable accident" was synonymous with "act of God," and excused the



the duty of the carrier.<sup>285</sup> It is his duty to do his utmost, as against all perils, including the excepted perils, to protect the goods from loss or damage. If, notwithstanding such care and diligence, damage does occur, he is relieved from liability; but if his negligence has brought about the peril the damage is attributable to his breach of duty, and the exception does not aid him.<sup>286</sup> It is the duty of carriers to exercise ordinary care to carry safely, even in cases where they are not insurers.<sup>287</sup> In cases where they are insurers, the question of negligence or diligence is wholly immaterial.

*Reason of Rule.*

"The law charges this person [the common carrier] thus intrusted to carry goods against all acts but acts of God and the enemies of the king. For, though the force be ever so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, or combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon on that point." \*

"When goods are delivered to a carrier, they are usually no longer under the eye of the owner. He seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added

carrier. *Hays v. Kennedy*, 41 Pa. St. 378; *Fish v. Chapman*, 2 Ga. 349. Cf. *Central Line v. Lowe*, 50 Ga. 509; *McClenaghan v. Brock*, 5 Rich. Law (S. C.) 88; *Harrington v. Lyles*, 2 Nott & McC. (S. C.) 88.

<sup>285</sup> Redm. Ry. Carr. p. 4.

<sup>286</sup> *Gill v. Railroad Co.*, 42 Law J. Q. B. 89.

<sup>287</sup> *Marshall v. Railroad Co.*, 11 C. B. 665, note.

\* *Holt, C. J.*, in *Coggs v. Bernard*, 2 Ld. Raym. 909, 918.

to that responsibility of a carrier which immediately arises out of his contract to carry for a reward—namely, that of taking all reasonable care of it—the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the king's enemies." †

"The case of a carrier stands upon peculiar grounds. He is held responsible as an insurer of the goods to prevent combinations, chicanery and fraud." ‡

*Burden of Proof.*

In an action for damages against a common carrier for goods lost or injured while in the latter's possession, proof of the loss or injury makes out a *prima facie* case of liability. The burden of proof is upon the carrier to show that the loss or injury was caused by one of the excepted perils against which he is not an insurer.<sup>238</sup> Upon proof that the loss was caused by such excepted peril, as by act of God or the public enemy, the carrier is *prima facie* not liable; and, to charge him with the loss, the burden of proof is upon the plaintiff to show that the carrier was negligent.<sup>239</sup> But the au-

† *Riley v. Horne*, 5 Bing. 217.

‡ *Spencer, J.*, in *Roberts v. Turner*, 12 Johns. 232, 233. See, also, *Thomas v. Railroad Co.*, 10 Mete. (Mass.) 472, 476; *Hollister v. Nowlen*, 10 Wend. 234, 240; *Elkins v. Railroad Co.*, 23 N. H. 275, 285; *Moss v. Railroad Co.*, 24 N. H. 71; *Forward v. Pittard*, 1 Term R. 27.

<sup>238</sup> *Davis v. Railroad Co.*, 89 Mo. 340, 1 S. W. 327; *Wallingford v. Railroad Co.*, 26 S. C. 258, 2 S. E. 19; *Slater v. Railway Co.*, 29 S. C. 96, 6 S. E. 936. The plaintiff's own showing may exempt the carrier from liability. *Davis v. Railroad Co.*, *supra*.

<sup>239</sup> *Witting v. Railroad Co.*, 101 Mo. 631, 14 S. W. 743; *Davis v. Railroad Co.*, 89 Mo. 340, 1 S. W. 327; *Read v. Railroad Co.*, 60 Mo. 199 (cf. *Hill v. Sturgeon*, 28 Mo. 323); *Steers v. Steamship Co.*, 57 N. Y. 1; *Lamb v. Railroad Co.*, 46 N. Y. 271; *Cochran v. Dinsmore*, 49 N. Y. 249; *Patterson v. Clyde*, 67 Pa. St. 500; *Colton v. Railroad Co.*, 67 Pa. St. 211; *Farnham v. Railroad Co.*, 55 Pa. St. 53; *Goldey v. Railroad Co.*, 30 Pa. St. 242 (cf. *Pennsylvania R. Co. v. Miller*, 87 Pa. St. 395; *Hays v. Kennedy*, 41 Pa. St. 378; *Whitesides v. Russell*, 8 Watts & S. 44); *Little Rock, M. R. & T. R. Co. v. Corcoran*, 40 Ark. 375; *Little Rock, M. R. & T. Ry. Co. v. Harper*, 44 Ark. 208; *Kansas Pac. Ry. Co. v. Reynolds*, 8 Kan. 623; *Kallman v. Express Co.*, 3 Kan. 205; *Kel*

thorities are not uniform. Many courts hold that, to excuse himself, the carrier must show, not only that the loss was caused by an excepted peril, but that he exercised reasonable skill and diligence, or, in other words, was guilty of no negligence.<sup>240</sup>

*Retention of Custody by Shipper.*

Where the goods are not put into the exclusive custody and control of the carrier, but, on the contrary, the shipper, by himself or servant, accompanies them and retains possession, the extraordinary liability of a common carrier does not attach.<sup>241</sup> "In such cases the owner, so far from having made delivery to the carrier, has purposely withheld it. He has not trusted the carrier, and where there has been no trust reposed there can be no liability, for trust is the very basis of the liability."<sup>242</sup> Thus, where a steerage passenger in a ship retained exclusive possession and custody of his trunk, and trusted to his own care and vigilance to protect it

ham v. The Kensington, 24 La. Ann. 100; Smith v. Railroad Co., 64 N. C. 235; Hubbard v. Express Co., 10 R. I. 244; Louisville & N. R. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Memphis & C. R. Co. v. Reeves, 10 Wall. 176; Western Transp. Co. v. Downer, 11 Wall. 129; Christie v. The Craighton, 41 Fed. 62. See, also, Mitchell v. Express Co., 46 Iowa, 214; Sager v. Railroad Co., 31 Me. 228.

<sup>240</sup> South & N. A. R. Co. v. Henlein, 52 Ala. 606; Steele v. Townsend, 37 Ala. 247; Berry v. Cooper, 28 Ga. 543; Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 1003; Chicago, St. L. & N. O. R. Co. v. Abels, Id. 1017; Gains v. Transportation Co., 28 Ohio St. 418; United States Express Co. v. Backman, Id. 144; Graham v. Davis, 4 Ohio St. 362; Union Express Co. v. Graham, 26 Ohio St. 595; Slater v. Railway Co., 29 S. C. 96, 6 S. E. 936; Swindler v. Hillard, 2 Rich. Law (S. C.) 286; Baker v. Brinson, 9 Rich. Law (S. C.) 201; Missouri Pac. Ry. Co. v. China Manuf'g Co., 79 Tex. 26, 14 S. W. 785; Ryan v. Railroad Co., 65 Tex. 13; Brown v. Express Co., 15 W. Va. 812; Shriver v. Railroad Co., 24 Minn. 506; Chicago, B. & Q. R. Co. v. Manning, 23 Neb. 552, 37 N. W. 462.

<sup>241</sup> Tower v. Railroad Co., 7 Hill (N. Y.) 47. But see Hollister v. Nowlen, 19 Wend. 234; Yerkes v. Sabin, 97 Ind. 141. "To effect a delivery to a carrier, there must be, either actually or in legal effect, a complete surrender to him of possession and custody; and, as a consequence, all control over the goods must be abandoned by the owner until the purpose of the bailment has been accomplished; and, until this has been done, it cannot be said that the carrier has assumed any responsibility for them as carrier." Hutch. Carr. § 91.

<sup>242</sup> Hutch. Carr. § 86.

against loss, the proprietor of the ship was held not liable as a common carrier.<sup>243</sup> So, also, where one who shipped goods by boat, put a guardian on board, who locked the hatches, and went with the goods to see that they were delivered safely, the proprietor of the boat was held not liable as a common carrier, there "not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant."<sup>244</sup>

In *Wyckoff v. Ferry Co.*,<sup>245</sup> it was said: "A ferryman is not a common carrier of the property retained by a passenger in his own custody and under his own control, and liable as such for all losses and injuries except those caused by the act of God or the public enemies. \* \* \* Property carried upon a ferryboat, in the custody and control of the owner, a passenger, is not at the sole risk of either the ferryman or the owner. If lost or damaged by the act or neglect of the ferryman, he must respond to the owner. The ordinary rules governing in actions for negligence apply, and a plaintiff cannot recover if he is guilty of negligence, on his part, contributing to the loss. The liability of a common carrier, in all its extent, only attaches when there is an actual bailment, and the party sought to be charged has the exclusive custody and control of property for carriage."<sup>246</sup>

### *Act of God.*

Where goods have been lost or injured by what is known in legal phraseology as the "act of God," the carrier is not liable. He is not an insurer against such perils. While the authorities are unanimous in recognizing the exception, they are not wholly consistent in its application. A loss is caused by the act of God when it is occasioned by the elementary forces of nature, entirely unconnected with any human agency or other cause.<sup>247</sup> Some authorities hold that the act of nature must have been violent, in order to excuse

<sup>243</sup> *Cohen v. Frost*, 2 Duer (N. Y.) 335.

<sup>244</sup> *East India Co. v. Pullen*, 1 Strange, 690.

<sup>245</sup> 52 N. Y. 32.

<sup>246</sup> See, also, "Baggage," post, p. 392.

<sup>247</sup> *Redm. Ry. Carr. p.* 122; *Nugent v. Smith*, 1 C. P. Div. 19, 423, 1 Eng. Ruling Cas. 218.

the carrier;<sup>248</sup> others, that it is sufficient if the accident is in no way attributable to the fault or negligence of the carrier, provided no other human agency contributed.<sup>249</sup> The true test is the entire absence of any human agency in producing the loss.<sup>250</sup> The presence or absence of violence is immaterial, except in its effect on the question as to whether the carrier exercised due care to preserve the goods.<sup>251</sup> The less sudden and violent actions of the elements may be more readily foreseen and guarded against, and therefore a failure to do so will ordinarily be negligence, which is regarded as the proximate cause of the loss, rather than the action of the elements.<sup>252</sup>

*Same—Inevitable Accident.*

The phrase "inevitable accident" must not be confounded with the phrase "act of God." The two are not synonymous. "It is obvious, as was pointed out by Lord Mansfield in *Forward v. Pittard*,<sup>253</sup> that all causes of inevitable accident (*casus fortuitus*) may be divided into two classes,—those which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause; and those which have their origin, either in whole or in part, in the agency of man, whether in acts of commission or omission, of nonfeasance or misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term 'act of God' to the latter class of inevitable accidents. It is equally clear that storm and tempest belong to the class to which the term 'act of God' is properly applicable."<sup>254</sup>

<sup>248</sup> Lawson, Bailm. §§ 119-121; Hutch. Carr. § 176.

<sup>249</sup> Hutch. Carr. § 175; Story, Bailm. §§ 489, 490, 511; 2 Kent, Comm. 597. See criticism of *Colt v. McMechen*, 6 Johns. 160, in American notes to *Coggs v. Bernard*, Smith, Lead. Cas. p. 317.

<sup>250</sup> *Merritt v. Earle*, 29 N. Y. 115; *Trent. Nav. Co. v. Ward*, 3 Esp. 127; *McArthur v. Sears*, 21 Wend. 190; *Ewart v. Street*, 2 Bailey (S. C.) 157; *Backhouse v. Sneed*, 1 Murph. (N. C.) 173.

<sup>251</sup> Schouler, Bailm. p. 391.

<sup>252</sup> Post, p. 401.

<sup>253</sup> 1 Term R. 27.

<sup>254</sup> *Nugent v. Smith*, 1 O. P. Div. 19. Cf. *Fish v. Chapman*, 2 Ga. 349; *Central Line v. Lowe*, 50 Ga. 509; *Hays v. Kennedy*, 41 Pa. St. 378.



*Same—Proximate and Exclusive Cause.*

In fixing liability for consequences, the common law looks only to the proximate cause of the result under consideration. All other contributing causes are disregarded. Therefore the act of God, in order to relieve the carrier of liability, must have been the proximate cause of the loss.<sup>255</sup>

It follows from the definition of an "act of God" as an act of nature, entirely unconnected with any human agency, that it must be the exclusive cause of the loss, or the carrier will be liable.<sup>256</sup> So, where a vessel struck a concealed anchor in a river, and was sunk, the carrier was held liable, because a human agency had contributed to the injury, by placing the anchor where it was at the time it was struck.<sup>257</sup> So, if an unseaworthy vessel is sunk by an act of God—a violent wind—that would not have sunk a seaworthy vessel, the owners are liable to the shippers for the loss they sustained.<sup>258</sup> In *McArthur v. Sears*<sup>259</sup> the master of a vessel, though exercising due care, on a hazy and snowy night, when objects were difficult to distinguish, mistook a signal light, and in consequence his vessel grounded. The carrier was held liable. Cowen, J., said: "I have sought in vain for any case to excuse the loss of the carrier where it arises from human action or neglect, or any combination of such action or neglect, except force exerted by a public enemy. No matter what degree of prudence may be exercised by the carrier and his servants, although the delusion by which it is baffled or the force by which it is overcome be inevitable, yet, if it be the result of human means, the carrier is responsible. \* \* \* I believe it is matter of history that inhabitants of remote coasts, accustomed to plunder wrecked vessels, have sometimes resorted to the expedient of luring benighted mariners, by false lights, to a rocky shore. Even such a harrowing

<sup>255</sup> *Merritt v. Earle*, 29 N. Y. 115; *Smith v. Sheperd*, Abb. Shipp. (13th Ed.) p. 459; *New Brunswick Steamboat, etc., Co. v. Tiers*, 24 N. J. Law, 697.

<sup>256</sup> *Packard v. Taylor*, 35 Ark. 402; *Merritt v. Earle*, 29 N. Y. 115; *Michaels v. Railroad Co.*, 30 N. Y. 564; *King v. Shepherd*, 3 Story, 349, Fed. Cas. No. 7,804; *Ewart v. Street*, 2 Bailey, 157; *Sprowl v. Kellar*, 4 Stew. & P. 382. Cf. *Blythe v. Railroad Co.*, 15 Colo. 333, 25 Pac. 782.

<sup>257</sup> *Trent Nav. Co. v. Ward*, 3 Esp. 127.

<sup>258</sup> *Packard v. Taylor*, 35 Ark. 402; *Bell v. Reed*, 4 Bin. (Pa.) 127.

<sup>259</sup> 21 Wend. 190.

combination of fraud and robbery would form no excuse. \* \* \* The difficulty returns, therefore. If we receive the immediate agency of third persons in any shape, we open the very door for collusion which has denied an excuse by reason of theft, robbery, and fire."

*Same—Negligence of Carrier.*

It is the duty of common carriers to use reasonable care and diligence to avoid all loss or injury, even from causes against which they are not insurers. If they fail to do so, and the goods are damaged by an act of God, or other excepted peril, their negligence is regarded as the proximate cause of the loss, and the carrier is held liable.<sup>260</sup> Therefore, if the carrier negligently exposes the goods to peril from an act of God,<sup>261</sup> as where he puts to sea in an unseaworthy vessel,<sup>262</sup> or attempts to cross a stream with an insufficient team,<sup>263</sup> or when a dangerous wind is blowing,<sup>264</sup> he is liable for the resulting loss. So, also, where goods are injured or exposed to peril, though by the act of God, it is the carrier's duty to render the loss as light as possible; and, if he negligently fails to do so, he is liable for all losses which he might, with reasonable care, have prevented.<sup>265</sup>

*Same—Deviation from Usual Course.*

Where the carrier, without necessity or reasonable excuse, deviates from the usual or agreed route of travel, he is absolutely liable for

<sup>260</sup> Wolf v. Express Co., 43 Mo. 421; Pruitt v. Railroad Co., 62 Mo. 527; Davis v. Railroad Co., 89 Mo. 340; Elliott v. Rossell, 10 Johns. 1.

<sup>261</sup> Williams v. Grant, 1 Conn. 487; Morgan v. Dibble, 24 Tex. 107; Klauber v. Express Co., 21 Wis. 21; Cook v. Gourdin, 2 Nott & McC. (S. C.) 19. Where the carrier takes one of two routes which he knows is more unsafe and dangerous than the other, he assumes the risk of loss by so doing. Express Co. v. Kountze, 8 Wall. 342.

<sup>262</sup> Bell v. Reed, 4 Bin. (Pa.) 127.

<sup>263</sup> Campbell v. Morse, 1 Harp. (S. C.) 262.

<sup>264</sup> Cook v. Gourdin, 2 Nott & McC. (S. C.) 19.

<sup>265</sup> Hutch. Carr. § 201; Craig v. Childress, Peck, 270; Day v. Ridley, 16 Vt. 48. The carrier need exercise only reasonable care. Nashville, etc., R. Co. v. David, 6 Heisk. 261; Morrison v. Davis, 20 Pa. St. 171; Railroad Co. v. Reeves, 10 Wall. 176; Black v. Railroad Co., 30 Neb. 197, 46 N. W. 428; Gillespie v. Railroad Co., 6 Mo. App. 554; Nugent v. Smith, 1 C. P. Div. 423; The Generous, 2 Dods. 322. But see The Niagara v. Cordes, 21 How. 7; King v. Shepherd, 3 Story, 349, Fed. Cas. No. 7,804. See, also, Smith v. Railroad Co., 91 Ala. 455, 8 South. 754; Milwaukee & St. P. R. Co. v. Kellogg,

the goods, without exception from any cause whatsoever.<sup>266</sup> It is wholly immaterial that the goods were destroyed by an act of God, or other excepted peril, or that they would have been likewise destroyed even if the usual route had been followed.<sup>267</sup> This absolute liability rests on the proposition that the wrongful deviation amounts to a conversion, and the carrier is thereafter liable as owner until the original owner voluntarily accepts a return of the goods.<sup>268</sup> This principle has already been fully discussed in the chapter on "Hiring."<sup>269</sup> Nothing but a real necessity, as when the safety of the goods requires it, will justify a deviation.<sup>270</sup> In such cases the consent of the owner may be presumed.<sup>271</sup> But the burden of proving a

94 U. S. 475; *Blythe v. Railroad Co.*, 15 Colo. 333, 25 Pac. 702; *Id.*, 97 Am. Dec. 409, note; *Baltimore & O. R. Co. v. Sulphur Springs School Dist.*, 96 Pa. St. 65; *Denny v. Railroad Co.*, 13 Gray, 481; *Collier v. Valentine*, 11 Mo. 299. Where goods are wet by a storm, the carrier must open and dry them. *Chouteaux v. Leech*, 18 Pa. St. 224.

<sup>266</sup> *Crosby v. Fitch*, 12 Conn. 410; *Powers v. Davenport*, 7 Blackf. 497; *Davis v. Garrett*, 6 Bing. 716; *Merchants' Dispatch Transp. Co. v. Kahn*, 76 Ill. 520.

<sup>267</sup> *Id.*; *Hutch. Carr.* § 190.

<sup>268</sup> The true reason for this absolute liability has not always been recognized, and there has been much loose talk on the subject, even in cases correctly decided. See *Davis v. Garrett*, 6 Bing. 716, where *Tindal, C. J.*, said: "But we think the real answer to the objection is that no wrongdoer can be allowed to apportion or qualify his own wrong, and that, as a loss has actually happened while this wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up, as an answer to the action, the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done." See, also, *Lawson, Bailm.* § 127; *Hutch. Carr.* § 190; *Maghee v. Camden & A. R. Transp. Co.*, 45 N. Y. 514. Where the carrier has wrongfully refused to deliver the goods, he is liable for a subsequent destruction of them by an act of God, for he is guilty of a conversion. *Richmond & D. R. Co. v. Benson*, 86 Ga. 203, 12 S. E. 357.

<sup>269</sup> See ante, p. 189.

<sup>270</sup> *Hand v. Baynes*, 4 Whart. (Pa.) 204; *Johnson v. Railroad Co.*, 33 N. Y. 610. Taking another vessel in tow, when not in distress, constitutes a deviation. *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. 340.

<sup>271</sup> *Johnson v. Railroad Co.*, 33 N. Y. 610. And see *International & G. N. R. Co. v. Wentworth* (Tex. Civ. App.) 27 S. W. 680.

necessity for the deviation rests upon the carrier.<sup>272</sup> In accordance with these principles, a master who deviated from the usual and customary course of his voyage was held liable for a loss caused by a tempest.<sup>273</sup> So when the contract was to carry by land, and the goods were sent by water, the carrier is liable for their destruction by the act of God.<sup>274</sup> So he is liable if he agrees to send them by a particular line of boats, and sends them by another.<sup>275</sup> If the owner of the designated line of boats refuses to receive the goods, the carrier should notify the owner, and await instructions.<sup>276</sup>

*Same—Unreasonable Delay.*

The fact that there has been a negligent and unreasonable delay in the transportation, so that the goods are overtaken by casualty due solely to natural causes, and which could not have been anticipated in the exercise of reasonable foresight, nor avoided after the danger became apparent, will not render the carrier liable for loss resulting from such casualty.<sup>277</sup> Thus, where a canal boat was wrecked by an extraordinary flood, which it would have escaped had it not been delayed by the lameness of a horse, the carrier was held not liable.<sup>278</sup> Other authorities dissent from this doctrine, and hold that if the carrier delays an unreasonably long time on the journey, and it is proved

<sup>272</sup> *Le Sage v. Railroad Co.*, 1 Daly (N. Y.) 306.

<sup>273</sup> *Davis v. Garrett*, 6 Bing. 716. The same principle applies to carriers by land. See *Powers v. Davenport*, 7 Blackf. 496; *Phillips v. Brigham*, 26 Ga. 617; *Lawrence v. McGregor*, Wright N. P. 193.

<sup>274</sup> *Ingalls v. Brooks*, Edm. Sel. Cas. 104; *Philadelphia & R. R. Co. v. Beek*, 125 Pa. St. 620, 17 Atl. 505. So, where the agreement was to send by canal, and they were sent by sea. *Hand v. Baynes*, 4 Whart. (Pa.) 204.

<sup>275</sup> *Johnson v. New York Cent. R. Co.*, 33 N. Y. 610; *Cox v. Foscue*, 37 Ala. 505. So, if the agreement is to send by steam, and the goods are sent by sail. *Wilcox v. Parmelee*, 3 Sandf. 610. A carrier must follow instructions as to the selection of carriers beyond his own route. *Johnson v. New York Cent. R. Co.*, supra.

<sup>276</sup> *Goodrich v. Thompson*, 44 N. Y. 324. And see *Fisk v. Newton*, 1 Denio. 45.

<sup>277</sup> *Denny v. Railroad Co.*, 13 Gray, 481; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Hoadley v. Transportation Co.*, 115 Mass. 304; *Morrison v. Davis*, 20 Pa. St. 171; *Railroad Co. v. Reeves*, 10 Wall. 176; *McClary v. Railroad Co.*, 3 Neb. 44. And see *Caldwell v. Express Co.*, 1 Flipp. 88, Fed. Cas. No. 2303; *Collier v. Valentine*, 11 Mo. 299.

<sup>278</sup> *Morrison v. Davis*, 20 Pa. St. 171.

that but for such unreasonable delay he would have been able to carry the goods in safety, he will be liable for an injury, though caused by an act of God. The courts of New York and some other states take this view of the question.<sup>279</sup> The true principle would seem to be that the carrier is not liable unless the wrongful delay was the proximate cause of the loss.<sup>280</sup> That is to say, unless the natural and probable consequence of the delay was to expose the goods to peril, either from an act of God or other cause, the carrier cannot be held liable on the ground of delay alone. It has been thought by some writers that a wrongful delay should have the same effect upon the carrier's liability as a wrongful deviation.<sup>281</sup> But this cannot be true, unless such delay can be regarded as such an act of dominion over the property as to amount to a conversion.

*Same—Illustrations of "Acts of God."*

Losses by the following causes have been held to be losses by the act of God: Lightning,<sup>282</sup> tempest,<sup>283</sup> earthquake,<sup>284</sup> extraordinary flood,<sup>285</sup> a sudden gust<sup>286</sup> or severe gale<sup>287</sup> of wind, the sudden ces-

<sup>279</sup> Read v. Spaulding, 30 N. Y. 630; Michaels v. Railroad Co., Id. 564; Condict v. Railway Co., 54 N. Y. 500; Dunson v. Railroad Co., 3 Lans. 265; Hewett v. Railroad Co., 63 Iowa, 611, 19 N. W. 790; Read v. Railroad Co., 60 Mo. 199; McGraw v. Railroad Co., 18 W. Va. 361; Pruitt v. Railroad Co., 62 Mo. 527; Michigan Cent. R. Co. v. Curtis, 80 Ill. 324; Southern Exp. Co. v. Womack, 1 Heisk. 256.

<sup>280</sup> Railroad Co. v. Reeves, 10 Wall. 176; Morrison v. Davis, 20 Pa. St. 171; Denny v. Railroad Co., 13 Gray, 481; Hoadley v. Transportation Co., 115 Mass. 304. And see Jones v. Gilmore, 91 Pa. St. 310, 314.

<sup>281</sup> Brown, Carr. § 98; Hutch. Carr. §§ 199, 200. Mr. Lawson (Bailm. § 126) expresses no opinion on the subject.

<sup>282</sup> Forward v. Pittard, 1 Term R. 27, 33.

<sup>283</sup> Gillett v. Ellis, 11 Ill. 579.

<sup>284</sup> Slater v. Railway Co., 29 S. C. 96, 6 S. E. 936.

<sup>285</sup> Lovering v. Coal Co., 54 Pa. St. 291; Nashville, etc., R. Co. v. David, 6 Heisk. 261; Davis v. Railroad Co., 89 Mo. 340, 1 S. W. 327; Norris v. Railway Co., 23 Fla. 182, 1 South. 475; Smith v. Railway Co., 91 Ala. 455, 8 South. 754. A flood such as has occurred but twice in a generation is an act of God. Pearce v. The Thomas Newton, 41 Fed. 106.

<sup>286</sup> Germania Ins. Co. v. The Lady Pike, 17 Am. Law Rep. 614.

<sup>287</sup> Blythe v. Railroad Co., 15 Colo. 333, 25 Pac. 702; Id., 11 Lawy. Rep. Ann. 615, and notes. See, also, Miltimore v. Railroad Co., 37 Wis. 190.



sation of wind,<sup>288</sup> snowstorms,<sup>289</sup> the breaking of a dam,<sup>290</sup> the freezing of navigable waters,<sup>291</sup> the freezing of fruit trees en route.<sup>292</sup> Where a vessel struck on a hidden rock, whose position was not previously known, the loss was held to be caused by the act of God.<sup>293</sup> The sinking of a boat by a snag lodged in the river by a freshet has been held to be within the exception;<sup>294</sup> but where a boat was lost by striking the mast of a sunken vessel,<sup>295</sup> or by running on a piece of timber projecting from a wharf, and not visible in ordinary tides,<sup>296</sup> the loss was not regarded as caused by an act of God; a human agency having intervened, in placing the obstruction at the place where the damage was done. Of course, if the carrier is negligent in failing to avoid the peril, his negligence, and not the act of God, is the cause of the loss.<sup>298</sup>

*Same—Cases not within the Act of God.*

Losses caused by fire, unless originated by lightning,<sup>299</sup> the explo-

<sup>288</sup> *Colt v. McMechen*, 6 Johns. 160.

<sup>289</sup> *Black v. Railroad Co.*, 30 Neb. 197, 46 N. W. 428; *Feinberg v. Railroad Co.*, 52 N. J. Law, 451, 20 Atl. 33; *Chaplin v. Railroad Co.*, 79 Iowa, 582, 44 N. W. 820.

<sup>290</sup> *Long v. Railroad Co.*, 147 Pa. St. 343, 23 Atl. 459 (the Johnstown flood of 1889).

<sup>291</sup> *Bowman v. Teall*, 23 Wend. 306; *Parsons v. Hardy*, 14 Wend. 215; *Worth v. Edmonds*, 52 Barb. 40; *West v. The Berlin*, 3 Iowa, 532.

<sup>292</sup> *Vail v. Railroad Co.*, 63 Mo. 230.

<sup>293</sup> *Williams v. Grant*, 1 Conn. 487. Provided it is not laid down in any chart. *Pennewill v. Cullen*, 5 Har. (Del.) 238.

<sup>294</sup> *Smyrl v. Niolen*, 2 Bailey (S. C.) 421. See, also, *Faulkner v. Wright, Rice*, 107.

<sup>295</sup> *Merritt v. Earle*, 29 N. Y. 115.

<sup>296</sup> *New Brunswick Steam Nav. Co. v. Tiers*, 24 N. J. Law, 697.

<sup>298</sup> That a similar flood had occurred once in each of the two preceding years, but the carrier had not changed the construction of its road, or provided other means of crossing the river, does not render him liable; such floods being, up to the time of the trial, otherwise unprecedented. *Norris v. Savannah, F. & W. Ry. Co.*, 23 Fla. 182, 1 South. 475. See ante, p. 347.

<sup>299</sup> *Forward v. Pittard*, 1 Term R. 27, 33; *Condict v. Railway Co.*, 54 N. Y. 500; *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *Parsons v. Monteath*, 13 Barb. 353; *Patton v. Magrath*, Dud. (S. C.) 159; *Gilmore v. Carman*, 1 Smedes & M. 279; *Moore v. Railroad Co.*, 3 Mich. 23; *Cox v. Patterson*, 30 Ala. 608; *Hyde v. Trent Nav. Co.*, 5 Term R. 389. Contra, *Hunt v. Morris*, 6 Mart. (La.) 676. The Chicago fire was held not to be an act of God in *Chicago & N. W. R. Co.*

sion of a boiler,<sup>800</sup> collision,<sup>801</sup> heat,<sup>802</sup> unseen obstructions to navigation,<sup>803</sup> and the shifting of a buoy,<sup>804</sup> have been held not to be losses by the act of God. It will be seen that the cases are not wholly consistent.

### *Public Enemy.*

Common carriers are not insurers against losses caused by the acts of the public enemy.<sup>805</sup> The "public enemy" means an organized military force, with which the country of the carrier is at war,<sup>806</sup> and pirates,<sup>807</sup> who are regarded as the common enemies of all mankind. Losses by thieves and robbers, strikers, rioters, and the like, do not fall within the exception.<sup>808</sup> Common carriers are

v. Sawyer, 69 Ill. 285. Carriers using steam are liable for losses by fire. *Garrison v. Memphis Ins. Co.*, 19 How. 312; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539; *Patton v. Magrath*, Dud. (S. C.) 159.

<sup>800</sup> *The Mohawk*, 8 Wall. 153; *Bulkley v. Naumkeag & Cotton Co.*, 24 How. 386.

<sup>801</sup> *Mershon v. Hobensack*, 22 N. J. Law, 372; *Plaisted v. Navigation Co.*, 27 Me. 132. "For no collision upon land can take place without the direct intervention of man; and, if happening between vessels at sea, in a tempest which made it inevitable, the tempest would be the vis major, and not the collision." *Hutch. Carr.* § 184.

<sup>802</sup> *Beard v. Railway Co.*, 79 Iowa, 518, 44 N. W. 800.

<sup>803</sup> *New Brunswick, S. & C. Transp. Co. v. Tiers*, 24 N. J. Law, 697; *Friend v. Woods*, 6 Grat. (Va.) 189.

<sup>804</sup> *Reaves v. Waterman*, 2 Speer, Law (S. C.) 197.

<sup>805</sup> *Hutch. Carr.* § 203 et seq.; *Russell v. Neimann*, 17 C. B. (N. S.) 163.

<sup>806</sup> *Lawson*, Bailm. § 129; *Story*, Bailm. §§ 512, 526; *Ang. Carr.* § 200; *Russell v. Neimann*, 17 C. B. (N. S.) 163. See, also, *Seligman v. Armijo*, 1 N. M. 459.

<sup>807</sup> *Lawson*, Bailm. § 129; *Story*, Bailm. § 526; *Pickering v. Barkley*, Style, 132. But see *The Belfast v. Boon*, 41 Ala. 50.

<sup>808</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909, 918; *The Belfast v. Boon*, 41 Ala. 50; *Boon v. The Belfast*, 40 Ala. 184; *Lewis v. Ludwick*, 6 Cold. 368; *Schiefelin v. Harvey*, 6 Johns. 170; *Watkinson v. Laughton*, 8 Johns. 164; *Morse v. Slue*, 1 Vent. 190. Indians on the warpath are public enemies. *Holladay v. Kennard*, 12 Wall. 254. Strikers are not a "public enemy," within the meaning of the exception. *Missouri Pac. Ry. Co. v. Nevill*, 60 Ark. 375, 30 S. W. 425. Their interference may excuse a delay, however, for the carrier is not an insurer of prompt delivery. *Gelsmer v. Railway Co.*, 102 N. Y. 563, 7 N. E. 828; *Pittsburgh, etc., R. Co. v. Hazen*, 84 Ill. 36; *Lake Shore & M. S. Ry. Co. v. Bennett*, 89 Ind. 457; *Pittsburgh, C. & St. L. Ry. Co. v. Hollowell*, 65

1. Shipper mediates the goods
  2. Carrier carries as to the value of the goods
  3. Packs goods negligently
  4. When the shipper, by itself the manner in which the goods are to be carried
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liable for losses caused by an insurrection,<sup>809</sup> unless it assumes the proportions of a civil war, as in the case of the American Revolution or the late war between the states.<sup>810</sup> A declaration of war is not necessary, if actual hostilities exist.<sup>811</sup> If, after entering into a contract of carriage, war breaks out between the country of the carrier and that to which the goods are to be carried, its nonperformance will be excused.<sup>812</sup>

As in the case of losses by act of God, the carrier is liable for losses by the public enemy, if his negligence contributed thereto.<sup>813</sup> If a carrier deviates from his route, he is absolutely liable for all losses, and it is wholly immaterial whether the loss would have happened without such deviation or not.<sup>814</sup> In the case of a wrongful delay the same considerations are applicable here as in the case of loss by act of God. That is to say, unless loss by the act of the public enemy was a natural and probable result of the delay, the carrier ought not to be held liable.<sup>815</sup>

#### *Act of the Shipper.*

Common carriers are not insurers against losses caused by the fraud or fault of the shipper.<sup>816</sup> For example, carriers have a right

Ind. 188; *Hass v. Railroad Co.*, 81 Ga. 792, *Gulf, C. & S. F. Ry. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191. Cf. *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476.

<sup>809</sup> *Missouri Pac. Ry. Co. v. Nevill*, 60 Ark. 375, 30 S. W. 425; *Forward v. Pittard*, 1 Term R. 27, 29. But see *Nesbite v. Luskington*, 4 Term R. 783.

<sup>810</sup> *Mauran v. Insurance Co.*, 6 Wall. 1; *Nashville & C. R. Co. v. Estes*, 10 Lea, 749; *The Prize Cases*, 2 Black, 635; *Hubbard v. Harnden Exp. Co.*, 10 R. I. 244; *Lewis v. Ludwick*, 6 Cold. 368. In the war between the states the Confederate forces were neither robbers on land nor pirates by sea. *Fifield v. Insurance Co.*, 47 Pa. St. 166; *Mauran v. Insurance Co.*, 6 Wall. 1. But see *Dole v. Merchants' Mutual Marine Ins. Co.*, 51 Me. 465.

<sup>811</sup> *The Prize Cases*, 2 Black, 635.

<sup>812</sup> *Esposito v. Bowden*, 7 El. & Bl. 762; *Reid v. Hoskins*, 5 El. & Bl. 729, affirmed 6 El. & Bl. 953.

<sup>813</sup> *Forward v. Pittard*, 1 Term R. 27; *Parker v. James*, 4 Camp. 112; *Clark v. Railroad Co.*, 39 Mo. 184; *Express Co. v. Kountze*, 8 Wall. 342.

<sup>814</sup> *Parker v. James*, 4 Camp. 112. And see comment on this case by Tindal, C. J., in *Davis v. Garrett*, 6 Bing. 716, 723.

<sup>815</sup> *Southern Exp. Co. v. Womack*, 1 Heisk. 256; *Holladay v. Kennard*, 12 Wall. 254. See ante, p. 361.

<sup>816</sup> Where the shipper put a horse in a car, and opened and left open a

to know the value of goods offered for carriage, in order that they may know what care to exercise, and graduate their charges according to the risk.<sup>317</sup> Therefore, if the shipper misrepresents the value of the goods, and they are lost, the carrier is not liable. The shipper need not state the value of the goods, unless asked to do so.<sup>318</sup> If asked, he must state the value truly.<sup>319</sup> But, even if not asked, he must not mislead the carrier into thinking the goods of little value.<sup>320</sup> Thus, where money was shipped, concealed in a bag filled with hay, the carrier was held not liable for its loss.<sup>321</sup> If the effect of the manner of packing is to deceive the carrier as to the value, as where a diamond ring is sent in a small paper box tied with a string,<sup>322</sup> it is immaterial whether a fraud was designed on the carrier or not;<sup>323</sup> "for by such deception the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it, had he known its actual value."<sup>324</sup> Where the consignor of goods is guilty of negligence in not properly

window through which the horse jumped, the carrier is not liable. *Hutchinson v. Railroad Co.*, 37 Minn. 524, 35 N. W. 433. See, also, *Roderick v. Railroad Co.*, 7 W. Va. 54.

<sup>317</sup> *Batson v. Donovan*, 4 Barn. & Ald. 21; *Cole v. Goodwin*, 19 Wend. 251; *Magnin v. Dinsmore*, 62 N. Y. 35; *Oppenheimer v. Express Co.*, 69 Ill. 62; *Graves v. Railroad Co.*, 137 Mass. 33.

<sup>318</sup> *Gorhan Manuf'g Co. v. Fargo*, 45 How. Prac. 90; *Camden & A. R. Co. v. Baldauf*, 16 Pa. St. 67; *Relf v. Rapp*, 3 Watts & S. 21; *Southern Exp. Co. v. Crook*, 44 Ala. 468; *Railroad Co. v. Fraloff*, 100 U. S. 24.

<sup>319</sup> *Phillips v. Earle*, 8 Pick. 182.

<sup>320</sup> As by placing money in a box, together with articles of small value. *Chicago & A. R. Co. v. Thompson*, 19 Ill. 578; *Magnin v. Dinsmore*, 62 N. Y. 35; *Earnest v. Express Co.*, 1 Woods. 573, Fed. Cas. No. 4,248.

<sup>321</sup> *Gibbon v. Paynton*, 4 Burrows, 2298.

<sup>322</sup> *Everett v. Southern Exp. Co.*, 46 Ga. 303. And see *Sleat v. Fagg*, 5 Barn. & Ald. 342.

<sup>323</sup> *Warner v. Transportation Co.*, 5 Rob. (N. Y.) 490; *Orange Co. Bank v. Brown*, 9 Wend. 85; *Pardee v. Drew*, 25 Wend. 459; *Chicago & A. R. Co. v. Thompson*, 19 Ill. 578; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30, 14 Eng. Law & Eq. Rep. 367; *Shaacht v. Railroad Co.*, 94 Tenn. 658, 30 S. W. 742.

<sup>324</sup> *Hutch. Carr.* § 213. So, where a box contains glass, the carrier should be informed of it. *American Exp. Co. v. Perkins*, 42 Ill. 458. See, also, generally, *Relf v. Rapp*, 3 Watts & S. 21; *Hollister v. Nowlen*, 19 Wend. 234; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; *St. John v. Express Co.*, 1 Woods, 612, Fed. Cas. No. 12,228.

marking their destination upon them, common carriers are not liable for injuries resulting from their being missent,<sup>325</sup> or delivered to the wrong person.<sup>326</sup> Where goods are injured by reason of improper packing, the carrier is not liable.<sup>327</sup> The improper packing which will excuse the carrier is some internal or latent defect, of which the carrier does not know, and from which loss or damage ensues to the goods in the ordinary course of transportation and handling. A hidden defect in the packing is the act of the shipper, for which the carrier is not responsible.<sup>328</sup>

Where the shipper directs how the goods shall be carried, the carrier is not liable for injuries caused by the manner of carriage.<sup>329</sup> So, where the shipper himself loads his goods<sup>330</sup> or furnishes the car,<sup>331</sup> or accompanies his goods under an agreement to care for them,<sup>332</sup> the carrier is not liable for any losses arising from the shipper's negligence in the performance of the duties assumed by him.

#### *Public Authority.*

Common carriers are not liable for goods taken from them by public authority.<sup>333</sup> Thus, where intoxicating liquors, or goods in-

<sup>325</sup> Congar v. Railroad Co., 24 Wis. 157; The Huntress, Davels, 82, Fed. Cas. No. 6,914; Erie R. Co. v. Wilcox, 84 Ill. 239; Southern Exp. Co. v. Kaufman, 12 Heisk. 161; Finn v. Railroad Co., 102 Mass. 283.

<sup>326</sup> Lake Shore & M. S. Ry. Co. v. Hodapp, 83 Pa. St. 22.

<sup>327</sup> Klauber v. Express Co., 21 Wis. 21. But see The Colonel Ledyard, 1 Sprague, 530, Fed. Cas. No. 3,027. But, if the improper packing did not contribute to the loss, the carrier is liable. Shriver v. Railroad Co., 24 Minn. 506.

<sup>328</sup> Klauber v. Express Co., 21 Wis. 21.

<sup>329</sup> White v. Winnisimmett Co., 7 Cush. 155; Wilson v. Hamilton, 4 Ohio St. 722; Western & A. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916.

<sup>330</sup> Miltimore v. Railroad Co., 37 Wis. 190; Rixford v. Smith, 52 N. H. 355; Ross v. Railroad Co., 49 Vt. 364; Betts v. Loan Co., 21 Wis. 80; East Tennessee, V. & G. R. Co. v. Johnston, 75 Ala. 596. But see McCarthy v. Railroad Co., 102 Ala. 193, 14 South. 370.

<sup>331</sup> Illinois Cent. R. Co. v. Hall, 58 Ill. 409. Or other appliances. Loveland v. Burke, 120 Mass. 139; Ross v. Railroad Co., 49 Vt. 364.

<sup>332</sup> Gleason v. Transportation Co., 32 Wis. 85; South & N. A. R. Co. v. Henlein, 52 Ala. 606; McBeath v. Railroad Co., 20 Mo. App. 445. See Bryant v. Railroad Co., 68 Ga. 805.

<sup>333</sup> Hutch. Carr. § 210 et seq.; Kohn v. Railroad Co., 37 S. C. 1, 16 S. E. 376.



fectured with contagious diseases, are seized under the police power, the carrier is not liable.<sup>334</sup> It is sufficient for the carrier's protection that the authority was de facto, if not de jure, the paramount public authority.<sup>335</sup> The carrier is not liable for goods taken from him by legal process fair on its face.<sup>336</sup> "Whatever may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority."<sup>337</sup>

*Inherent Nature of Goods.*

Common carriers are not insurers against losses caused by the inherent nature, vice, defect, or infirmity of the goods.<sup>338</sup> Thus, carriers are not liable for the decay of fruit, the evaporation or leakage

<sup>334</sup> Wells v. Steamship Co., 4 Cliff. 228, Fed. Cas. No. 17,401.

<sup>335</sup> Nashville & C. R. Co. v. Estes, 10 Lea, 749.

<sup>336</sup> Hutch. Carr. § 396 et seq.; Stiles v. Davis, 1 Black, 101; Bliven v. Railroad Co., 36 N. Y. 403; Pingree v. Railroad Co., 66 Mich. 143, 33 N. W. 298; Furman v. Railroad Co., 57 Iowa, 42, 10 N. W. 272; Id., 62 Iowa, 395, 17 N. W. 598; Id., 68 Iowa, 219, 26 N. W. 83; Id., 81 Iowa, 540, 46 N. W. 1049. Ohio & M. R. Co. v. Yohe, 51 Ind. 181; French v. Transportation Co., 134 Mass. 288; Jewett v. Olsen, 18 Or. 419, 23 Pac. 262; The Chase, 37 Fed. 708; Savannah, G. & N. A. R. Co. v. Wilcox, 48 Ga. 432. But see Bingham v. Lamping, 26 Pa. St. 340; McAlister v. Railroad Co., 74 Mo. 351; Miersen v. Hope, 2 Sweeny, 561. The remedy of the owner for an illegal seizure of his goods for the debt of another is not against the carrier, but against the officer making the seizure, or against the plaintiff, if he directed the seizure. Lawson, Bailm. 131; Stiles v. Davis, 1 Black, 101. But it has been held, in Massachusetts, that the carrier is not excused unless the proceedings be against the owner of the goods. Edwards v. Transit Co., 104 Mass. 159. See, also, Bingham v. Lamping, 26 Pa. St. 340. To protect the carrier, the process must be legal and valid. Edwards v. Transit Co., 104 Mass. 159; Kiff v. Railroad Co., 117 Mass. 591; Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855; Savannah, G. & N. A. R. Co. v. Wilcox, 48 Ga. 432. But it was held in McAlister v. Railroad Co., 74 Mo. 351, that a regular writ, issued under a statute afterwards declared unconstitutional, was sufficient to protect the carrier. The carrier is liable if he surrenders to an officer without a warrant. Bennett v. Express Co., 83 Me. 236, 22 Atl. 159.

<sup>337</sup> Per Campbell, C. J., in Pingree v. Railroad Co., 66 Mich. 143, 33 N. W. 298.

<sup>338</sup> Story, Bailm. § 492a; Hutch. Carr. § 216a.

of liquids, and the like.<sup>839</sup> Of course, if the carrier's negligence has contributed to the loss he is liable.<sup>840</sup> Care must be exercised with reference to the nature of the goods. This exception from liability rests on the same principle as the act of God, and, indeed, is but an illustration of it.<sup>841</sup> "Men are too apt to hear God in the thunder and storm, and ignore his existence in the still, small voice of the calm. But the acts of God are not always cataclysms, and 'natural decay' may as reasonably be classed under this head as 'tempests' or 'lightnings.'"<sup>842</sup> However, it is usual to treat this class of exceptions separately.

<sup>839</sup> *Beard v. Railroad Co.*, 79 Iowa, 518, 44 N. W. 800; *Gulf, C. & S. F. Ry. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191; *Cragin v. Railroad Co.*, 51 N. Y. 61; *Louisville, N. O. & T. Ry. Co. v. Bigger*, 66 Miss. 319, 6 South. 234; *Illinois Cent. R. Co. v. Brelsford*, 13 Ill. App. 251; *The Howard v. Wissman*, 18 How. 231; *The Collenberg*, 1 Black, 170; *Swetland v. Railroad Co.*, 102 Mass. 276; *Warden v. Greer*, 6 Watts, 424; *Powell v. Mills*, 37 Miss. 691; *Evans v. Railroad Co.*, 111 Mass. 142. Peaches were delayed by an extraordinary freshet, and, as they showed signs of decay, the carrier sold them for the best attainable price, for the benefit of the owner. It was held, in an action for damages, that the carrier was not liable for the loss, as it was owing to the inherent qualities of the freight, that it was not bound to seek another route, and that it was justified in selling the property. *American Exp. Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561, and note. Where potatoes were wet when shipped, and decayed on the voyage, the carrier is not liable. *The Howard v. Wissman*, 18 How. 231. See, also, *The Collenberg*, 1 Black, 170; *Brown v. Clayton*, 12 Ga. 564. Where the leakage is from an inherent defect of a cask, the carrier is not liable. *Hudson v. Baxendale*, 2 Hurl. & N. 575. A carrier is not liable for loss of molasses caused by its fermentation and expansion, nor for leakage from secret defects in the casks. *Warden v. Greer*, 6 Watts, 424. Where the bill of lading recites the receipt in good condition, leakage will not account for a loss of 2,000 out of 10,000 gallons. *Id.*

<sup>840</sup> *Beard v. Railroad Co.*, 79 Iowa, 518, 44 N. W. 800; *Harris v. Railroad Co.*, 20 N. Y. 232; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 624; *Welch v. Railroad Co.*, 10 Ohio St. 65; *Powell v. Railroad Co.*, 32 Pa. St. 414; *Smith v. Railroad Co.*, 12 Allen, 531; *Conger v. Railroad Co.*, 6 Duer (N. Y.) 375. As to whether a carrier may or must give perishable property precedence in transportation, see *Swetland v. Railroad Co.*, 102 Mass. 276; *Peet v. Railroad Co.*, 20 Wis. 594; *Tierney v. Railroad Co.*, 76 N. Y. 305; *Marshall v. Railroad Co.*, 45 Barb. 502.

<sup>841</sup> *Hutch. Carr.* § 216a; *Browne, Carr.* 102.

<sup>842</sup> *Wood, Browne, Carr.* § 106.

*End Tues Feb 11th*

**83. CARRIERS OF LIVE STOCK**—Carriers of live stock are common carriers whenever carriers of other goods would be. But they are not liable, in the absence of negligence, for such injuries as occur in consequence of the vitality of the freight.

The question as to whether the common-law rule as to the liability of common carriers should be extended so as to include carriers of live animals has been much discussed, and is one upon which there is a conflict of opinion. The question is an important one, as it affects the burden of proof in cases where damages are claimed for loss or injury.<sup>343</sup> If the defendant is not liable as a common carrier, the burden of proof is on the plaintiff to show that the loss was caused by the carrier's negligence. If the defendant is liable as a common carrier, the burden is on him, if he would excuse himself, to show that the loss was caused by an excepted peril, and without his negligence. The decision of the question also affects the obligation of the carrier to carry for all who offer. The contention has been principally in regard to railway companies. Other carriers are common carriers only of the goods and on the terms they profess to carry, which are easily ascertained. Railroad companies are created common carriers by their organic act, and the only question, in a given case, is whether they are common carriers of the particular thing in question.

The case of *Michigan S. & N. I. R. Co. v. McDonough*<sup>344</sup> is a leading case in support of the view that railroad companies are not common carriers of live stock.<sup>345</sup> In that case it was said: "For

<sup>343</sup> *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623.

<sup>344</sup> 21 Mich. 165. See, also, *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329.

<sup>345</sup> *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush (Ky.) 645; *Baker v. Railroad Co.*, 10 Lea, 304. "In Michigan, since April, 1870, railroads have not been public purposes or public uses, in the sense that they are such in other states of the Union. In that state they are purely and strictly private purposes or uses. *People v. Salem*, 20 Mich. 452, 475, 480, 485. The supreme court of that state say that 'they [railroad companies] are public agents in the same sense that the proprietors of any other kind of private business are, and not in any other or different sense.' 'Our policy in that respect,' say the court, 'has changed. Railroads are no longer public works, but

the purposes of this case, it may be assumed that this company, by their charter and act of consolidation, are required to take upon themselves the business of common carriers, and to transport, as such, all such property tendered to them for that purpose as was usually transported by railroads as common carriers at the date of the charter of the Michigan Southern Railroad Company, in 1846, and any other kinds of property which, in the progress of invention and business, might be tendered for such carriage, which should not, from its nature, impose risks of a different character, or require an essentially different mode of managing their road or the incurring of extra expenses on account of the different character of such new kinds of property. But the transportation of cattle and live stock by common carriers by land was unknown to the common law when the duties and responsibilities of common carriers were fixed, making them insurers against all losses and injuries not arising from the act of God or of the public enemies. These responsibilities and duties were fixed with reference to kinds of property involving in their transportation much fewer risks and of quite a different kind from those which are incident to the transportation of live stock by railroad. Animals have wants of their own to be supplied, and this is a mode of conveyance at which, from their nature and habits, most animals instinctively revolt; and cattle, especially, crowded in a dense mass, frightened by the noise of the engine, the rattling, jolting, and frequent concussions of the cars, in their frenzy, injure each other by trampling, plunging, goring, or throwing down, and frequently, on long routes, their strength exhausted by hunger and thirst, fatigue

are private property.' Railroads are private, according to that decision. In the same sense that the different kinds of business of hackmen, draymen, proprietors of stagecoaches, merchants, newspaper proprietors, physicians, manufacturers, mechanics, hotel keepers, millers, etc., are private. Railroads, in Michigan, seem, from that decision, to be such private corporations as are described in the case of *Leavenworth Co. v. Miller*, 7 Kan. 479, 524, 535. If they are such private corporations as there described, of course they have a right to be common carriers of just such property as they choose, no more and no less." *Kansas Pac. R. Co. v. Nichols*, 9 Kan. 235. Accordingly, in Michigan, railroad companies cannot be compelled to receive live stock, nor be held responsible for it as common carriers, unless they have voluntarily assumed that character. *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329.



and fright, the weak easily fall, and are trampled upon, and, unless helped up, must soon die. Hogs also swelter and perish.<sup>346</sup> It is a mode of transportation which, but for its necessity, would be gross cruelty, and indictable as such. The risk may be greatly lessened by care and vigilance, by feeding and watering at proper intervals, by getting up those that are down, and otherwise. But this imposes a degree of care and an amount of labor so different from what is required in reference to other kinds of property that I do not think this kind of property falls within the reasons upon which the common-law liability of common carriers was fixed.”<sup>347</sup>

The case of *Kansas Pac. Ry. Co. v. Nichols*<sup>348</sup> is a leading case in support of the opposite view. In that case the court said: “That railroads are created common carriers of some kind, we believe is the universal doctrine of all the courts. The main question is always whether they are common carriers of the particular thing then under consideration. The question in this case is whether they are common carriers of cattle. So far as our statutes are concerned, no distinction is made between the carrying of cattle and that of any other kind of property. Under our statutes a railroad may as

<sup>346</sup> See per Parke, B., in *Carr v. Railroad Co.*, 7 Exch. 707, 712; Denio, C. J., in *Clarke v. Railroad Co.*, 14 N. Y. 570, 573.

<sup>347</sup> “It is claimed there is a difference between live stock and other property as to the responsibility assumed by a carrier in its transportation; that the voluntary motion of the stock introduces an element of danger into the transportation against which neither reason nor authority require that the carrier insure; that, inasmuch as it is customary that the shipper, or some one for him, accompany the stock, there is only a qualified or partial delivery to the carrier; and also that proof that a railroad company has suitable cars, and is engaged in the business of carrying cattle, is not proof that it is a common carrier as to such cattle, because, to insure their safe transportation, requires yards and stables, with conveniences for feeding, both at the termini and along the route, as well as a corps of experienced stockmen to take care of them in the transit. These last, as it seems to us, are duties incident to the employment, and not elements to determine its character. Engaging in the business of transporting cattle, it becomes a duty to provide every suitable facility therefor. Not the manner of doing the work, but the fact of engaging in the business, is the test laid down in the books for determining the character of the carrier.” *Kansas Pac. Ry. Co. v. Reynolds*, 8 Kan. 623.

<sup>348</sup> 9 Kan. 235.



well be a common carrier of cattle as of goods, wares, and merchandise, or of any other kind of property. Now, as no distinction has been made by statute between the carrying of the different kinds of property, we would infer that railroads were created for the purpose of being common carriers of all kinds of property which the wants or needs of the public require to be carried, and which can be carried by railroads, and particularly we would infer that railroads were created for the purpose of being common carriers of cattle.

\* \* \* It is claimed, however, that 'the transportation of cattle and live-stock by common carriers by land was unknown to the common law.' Suppose it was; what does that prove? The transportation of thousands of other kinds of property, either by land or water, was unknown to the common law, and yet such kinds of property are now carried by common carriers and by railroads every day.

\* \* \* The reason why cattle and live stock were not transported by land by common carriers, at common law, was because no common carrier, at the time our common law was formed, had any convenient means for such transportation. Among the other kinds of property not transported by common carriers, either by land or water, at the time our common law was formed, are the following: Reapers, mowers, wheat drills, corn planters, cultivators, threshing machines, corn shellers, gypsum, guano, Indian corn, potatoes, tobacco, stoves, steam engines, sewing machines, washing machines, pianos, reed organs, fire and burglar proof safes, etc.; and yet no one would now contend that railroads are not common carriers of these kinds of articles. At common law the character of the carrier was never determined by the kind of property that he carried.

\* \* \* At common law no person was a common carrier of any article unless he chose to be, and unless he held himself out as such; and he was a common carrier of just such articles as he chose to be, and no others. If he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier of agricultural implements, such as plows, harrows, etc. If he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses.<sup>340</sup> And it seems to us clearly, be

<sup>340</sup>Tunnel v. Pettijohn, 2 Har. (Del.) 48.

yond all doubt, that if any person had, in England, prior to the year 1607, held himself out as a common carrier of cattle and live stock by land, the common law would have made him such. If so, where is the valid distinction that is attempted to be made between the carrying of live stock and the carrying of any other kind of personal property? The common law never declared that certain kinds of property only could be carried by common carriers, but it permitted all kinds of personal property to be so carried. At common law any person could be a common carrier of all kinds or any kind and of just such kinds of personal property as he chose; no more, nor less. Of course, it is well known that, at the time when our common law had its origin,—that is, prior to the year 1607,—railroads had no existence. But when they came into existence it must be admitted that they would be governed by the same rules, so far as applicable, which govern other carriers of property. Therefore it must be admitted that railroads might be created for the purpose of carrying one kind of property only, or for carrying many kinds, or for carrying all kinds of property which can be carried by railroads, including cattle, live stock, etc. In this state it must be presumed that they were created for the purpose of carrying all kinds of personal property. It can hardly be supposed that they were created simply for the purpose of being carriers of such articles only as were carried by common carriers under the common law prior to the year 1607; for, if such were the case, they would be carriers of but very few of the innumerable articles that are now actually carried by railroad companies. And it can hardly be supposed that they were created for the mere purpose of taking the place of pack horses, or clumsy wagons, often drawn by oxen, or such other primitive means of carriage and transportation as were used in England prior to that year. Railroads are undoubtedly created for the purpose of carrying all kinds of property which the common law would have permitted to be carried by common carriers in any mode, either by land or water, which probably includes all kinds of personal property. Our decision, then, upon this question, is that, whenever a railroad company receives cattle or live stock to be transported over their road from one place to another, such company assumes all the responsibilities of a common carrier, except so far as such responsibilities may be modified by special

contract." The weight of authority supports the view that carriers of live stock are common carriers, and liable as such whenever a carrier of other freight would be.<sup>350</sup>

*Inherent Vice, Disease, or Condition of Animals.*

While carriers of live stock are liable as insurers, just as carriers of other freight are, this absolute liability is subject to the same exceptions recognized in the case of ordinary freight. If live stock are injured by the act of God, the public enemy, the act of the shipper, public authority, or their inherent nature, the carrier, if guilty of no negligence, is not liable. The carrier's liability is especially contingent upon the inherent vice, disease, or condition of the animals shipped. By the expression "vice" is meant that sort of vice which, by its internal development, tends to the destruction or injury of the animal or thing to be carried.<sup>351</sup> In the transportation of live stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur in consequence of the vitality of the freight.<sup>352</sup> He does not absolutely warrant live freight against the

<sup>350</sup> 2 Jag. Torts, p. 1073; Maynard v. Railroad Co., 71 N. Y. 180; Cragin v. Railroad Co., 51 N. Y. 61; Penn v. Railroad Co., 49 N. Y. 204; Conger v. Railroad Co., 6 Duer (N. Y.) 375; Clarke v. Railroad Co., 14 N. Y. 570; Harris v. Railroad Co., 20 N. Y. 232; St. Louis & S. E. Ry. Co. v. Dorman, 72 Ill. 504; Ohio & M. R. Co. v. Dunbar, 20 Ill. 624; Chicago, R. I. & P. R. Co. v. Harmon, 12 Ill. App. 54; Ayres v. Railroad Co., 71 Wis. 372, 37 N. W. 432; Evans v. Railroad Co., 111 Mass. 142; Rixford v. Smith, 52 N. H. 355; Kinnick v. Railroad Co., 69 Iowa, 665, 29 N. W. 772; McCoy v. Railroad Co., 44 Iowa, 424; German v. Railroad Co., 38 Iowa, 127; Powell v. Railroad Co., 32 Pa. St. 414; Atchison & N. R. Co. v. Washburn, 5 Neb. 117; Porterfield v. Humphreys, 8 Humph. 497; Wilson v. Hamilton, 4 Ohio St. 722; Welsh v. Railroad Co., 10 Ohio St. 65; South & N. A. R. Co. v. Henlein, 52 Ala. 606; Kimball v. Railroad Co., 26 Vt. 247; Moulton v. Railway Co., 31 Minn. 85, 16 N. W. 497; Agnew v. The Contra Costa, 27 Cal. 425; Lindsley v. Railway Co., 36 Minn. 539, 33 N. W. 7; Gulf, C. & S. F. Ry. Co. v. Trawick, 68 Tex. 314, 5 S. W. 567; Michigan Cent. R. Co. v. Myrick, 1 Sup. Ct. 425; Brown v. Railroad Co., 18 Mo. App. 569; McFadden v. Railroad Co., 92 Mo. 313, 4 S. W. 689.

<sup>351</sup> Blower v. Railroad Co., L. R. 7 C. P. 655.

<sup>352</sup> Richardson v. Railroad Co., 61 Wis. 596, 21 N. W. 49; Illinois Cent. R. Co. v. Scruggs, 69 Miss. 418, 13 South. 698; Louisville, N. O. & T. Ry. Co. v. Bigger, 66 Miss. 319, 6 South. 234; Smith v. Railroad Co., 12 Allen, 531; Penn v. Railroad Co., 49 N. Y. 204. Where the carrier has used due care, and provided a suitable car, and the injuries were caused by the peculiar charac-

consequences of its own vitality. Animals may injure or destroy themselves or each other. They may die from fright, or from starvation because they refuse to eat, or they may die from heat or cold. In all such cases the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and

ter and propensities of the horse, such as fright and bad temper, the carrier is not liable. *Evans v. Railroad Co.*, 111 Mass. 142. It is the duty of the owner, delivering property to a carrier which he knows requires peculiar care in its safe transportation, to make known the necessity in order that the proper precaution may be used. *Wilson v. Hamilton*, 4 Ohio St. 722. In *Clarke v. Railroad Co.*, 14 N. Y. 570, it was held that common carriers of cattle are liable, not only for a safe and careful conveyance of the car containing them, but also for any injury which can be prevented by foresight, vigilance, and care, although arising from the conduct of the animal, and they are not relieved of this responsibility by the fact that the owner of the cattle was present, and aided in loading them, and was allowed a passage for himself in the train which carried the cattle. See, also, *Rixford v. Smith*, 52 N. H. 355; *Goldey v. Railroad Co.*, 30 Pa. St. 242; *McDaniel v. Railroad Co.*, 24 Iowa, 412. The carrier is not relieved from his liability merely because delay, which occasions damage to the property, is the result of an unavoidable accident, but is bound, notwithstanding the accident, to use the highest degree of care during the delay for the safety of the deposit. *Kinnick v. Railroad Co.*, 69 Iowa, 665, 29 N. W. 772. Where there is no misrepresentation or deceit on the part of the shipper of live stock, a common carrier waives all exceptions to the defects in loading by accepting stock so loaded for transportation, and assumes all the liabilities of a common carrier with reference to the property. *Id.* "No doubt the horse was the immediate cause of its own injuries, i. e. no person got into the box and injured it. It slipped, or fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, its proper vice,—that is, from fright, or temper, or struggling to keep its legs,—the defendants are not liable. But, if it so hurt itself from the defendants' negligence, or any misfortune happening to the train, though not through any negligence of the defendants (as, for instance, from the horse box leaving the line, through some obstruction maliciously laid upon it), then the defendants, as insurers, would be liable. If perishable articles, say soft fruits, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If, through pressure of other goods carried with them, or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable." *Kendall v. Railway*, L. R. 7 Exch. 373. A railroad company is not responsible for injuries inflicted upon one horse by another while they were being carried in the company's car, if the injuries were caused by the fault or neglect of the



exercised that degree of care which the nature of the property requires.<sup>353</sup>

**84. CARRIERS OF BAGGAGE**—Carriers of passengers are bound to also carry the passengers' reasonable baggage, and are liable, as common carriers, for its safe delivery.

Passengers traveling in public conveyances have a right to have a reasonable amount of baggage carried with them without extra charge.<sup>354</sup> The obligation to carry his baggage is incidental to the contract to carry the passenger. The fare paid is compensation for the carriage of both.<sup>355</sup> The carrier, however, is obliged to receive

owner of the horses, in attaching their halters, or not removing their shoes. *Evans v. Railroad Co.*, 111 Mass. 142. A shipper must disclose peculiarities affecting the risk (*Wilson v. Hamilton*, 4 Ohio St. 722; *Missouri Pac. R. Co. v. Fagan* [Tex. Civ. App.] 27 S. W. 887), but need not disclose facts apparent to observation (*McCune v. Railroad Co.*, 52 Iowa, 600, 3 N. W. 615; *Estill v. Railroad Co.*, 41 Fed. 849). A carrier of live stock cannot stipulate for exemption from liability for his own negligence. *Moulton v. Railway Co.*, 31 Minn. 85, 16 N. W. 497; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821.

<sup>353</sup> *Cragin v. Railroad Co.*, 51 N. Y. 61; *Giblin v. Steamship Co.*, 8 Misc. Rep. 22, 28 N. Y. Supp. 69; *Armstrong v. Express Co.*, 159 Pa. St. 640, 28 Atl. 448.

<sup>354</sup> It was at first held that carriers were not liable for the traveler's baggage unless a distinct price had been paid, on the ground that the carrier is liable only in respect to his reward, and that the compensation should be in proportion to the risk. *Middleton v. Fowler*, 1 Salk. 282. Subsequently, by common usage, a reasonable amount of baggage was deemed to be included with the fare of the passenger; but the courts should not allow this custom to be abused, and, under pretense of baggage, include articles not within the scope of the term, or intent of the parties, thereby defrauding the carrier of his just compensation, besides subjecting him to unknown hazards. *Pardee v. Drew*, 25 Wend. 459; *Bank v. Brown*, 9 Wend. 85. The traveling public have the right to stop and receive their baggage at any regular station or stopping place for the train on which they may be traveling, and any regulation that deprives them of that right is necessarily arbitrary, unreasonable, and illegal. *Pittsburgh, C. & St. L. Ry. Co. v. Lyon*, 123 Pa. St. 140, 16 Atl. 607.

<sup>355</sup> *Orange Co. Bank v. Brown*, 9 Wend. 85; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, 19 Wend. 251. A carrier is liable for the loss of the



only a reasonable amount of baggage, though he is liable for any amount received, in the absence of a contract or statutory limitation.<sup>356</sup> In the carriage of baggage the carrier is liable as a common carrier.<sup>357</sup> If, however, the passenger is carried free,<sup>358</sup> or if the baggage is not really baggage, within the legal meaning of the term,<sup>359</sup> the carrier is liable merely as a gratuitous bailee.

*What is Baggage.*

"Baggage" signifies such articles of convenience or necessity as are carried by a passenger for his personal use, either during the journey, or during his stay at the place of destination, and which are fit and proper for the personal use of persons in the same condition of life.<sup>360</sup> Other definitions are as follows: "Only such articles as a traveler usually carries with him for his comfort or convenience, both

luggage of a passenger whose fare was paid by another. The fare paid by a passenger to a carrier includes transportation of his baggage, and the carrier has a lien thereon for the fare, and may detain the same until payment thereof. *Roberts v. Koehler*, 30 Fed. 94.

<sup>356</sup> *Lawson, Bailm.* § 270; *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24; *Merrill v. Grinnell*, 30 N. Y. 594. "Where the carrier has notified the passenger that he will not be liable for baggage beyond a certain sum unless the true value is stated, the carrier will be discharged from his extraordinary liability if the passenger either refuses to disclose the value, or fails to do so, or by any artifice evades inquiry as to its true value. *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24. But where the carrier makes no such inquiry, and the passenger does not, by any act or artifice of his, mislead the carrier as to the true value of the package, his mere failure to disclose it is not such a fraud on the carrier as will release him from liability. *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24; *Lawson, Bailm.* § 276. And see *Brown v. Railroad Co.*, 83 Pa. St. 316. If any means have been used to conceal the value of a package, the carrier is not liable, whether he has given notice or not. *Orange Co. Bank v. Brown*, 9 Wend. 85. Notifying the carrier that it is "a trunk of importance," is not sufficient, in such a case, to charge him with knowledge of its value. *Id.*

<sup>357</sup> *Hollister v. Nowlen*, 19 Wend. 234. But not as to the person of the traveler. *Boyce v. Anderson*, 2 Pet. 150; *Christie v. Griggs*, 2 Camp. 79. Carriers are liable for the loss of baggage by theft, even when shipped as freight. *The State of New York*, 7 Ben. 450, Fed. Cas. No. 13,328; *Walsh v. The H. M. Wright*, Newb. 494, Fed. Cas. No. 17,115.

<sup>358</sup> *Flint & P. M. Ry. Co. v. Weir*, 37 Mich. 111.

<sup>359</sup> See post, p. 384.

<sup>360</sup> \$10,000 worth of lace is proper baggage for a Russian lady of wealth

during the journey and during his stay at the place of his destination.”<sup>361</sup> “All articles which it is usual for persons traveling to carry with them, whether from necessity, or for convenience or amusement.”<sup>362</sup> “Such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise and other valuables.”<sup>363</sup> Mr. Lawson’s elaborate definition is

traveling for pleasure. *Fraloff v. Railroad Co.*, 10 Blatchf. 16, Fed. Cas. No. 5,025; *Id.*, 100 U. S. 24. Six dozen shirts is proper baggage for a German gentleman, it being customary in Germany to keep on hand large quantities of linen, for the reason that washing is done less frequently in that country than in America. *Merrill v. Grinnell*, 30 N. Y. 594, 613. See, also, *Coward v. Railroad Co.*, 16 Lea, 225. Bedding is proper baggage for a poor man traveling with his family. *Ouimit v. Henshaw*, 35 Vt. 605. See, also, *Hirschsohn v. Packet Co.*, 34 N. Y. Super. Ct. 521; *Glovinsky v. Steamship Co.*, 4 Misc. Rep. 266, 24 N. Y. Supp. 136. But see *Connolly v. Warren*, 106 Mass. 146. Mr. Hutchinson thinks that *Ouimit v. Henshaw*, *supra*, and *Par-melee v. Fischer*, 22 Ill. 212, leave scarcely any limit to what may be regarded as a passenger’s baggage. *Hutch. Carr.* § 684. A carrier may refuse to carry merchandise as personal baggage, or anything except what is useful and necessary, or useful for the passenger’s personal comfort and convenience. *Collins v. Railroad Co.*, 10 Cush. (Mass.) 506; *Smith v. Railroad Co.*, 44 N. H. 325. It follows that the carrier may require information as to value and kind as a condition precedent to the transportation of articles offered as baggage. *Norfolk & W. R. Co. v. Irvine*, 84 Va. 553, 5 S. E. 532; *Id.*, 85 Va. 217, 7 S. E. 233; *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24.

<sup>361</sup> Wood, Ry. Law, § 40L.

<sup>362</sup> Ang. Carr. § 115.

<sup>363</sup> *Hutch. Carr.* § 679. This definition is substantially Judge Story’s. *Story*, *Bailm.* § 499. Of the latter definition it was said, in *Dibble v. Brown*, 12 Ga. 217, 226: “When we settle down, with Judge Story, upon the proposition that by baggage is to be understood ‘such articles of necessity or personal convenience as are usually carried by passengers, for their personal use,’ we are still without a rule for determining what articles are included in baggage. For such things as would be necessary to one man would not be necessary to another. Articles which would be held but ordinary conveniences by A. might be considered incumbrances by B. One man, from choice or habit, or from educational incapacity to appreciate the comforts or conveniences of life, needs, perhaps, a portmanteau, a change of linen, and an indifferent razor; while another, from habit, position, and education, is unhappy without all the appliances of comfort which surround him at home. The quantity and character of baggage must depend very much upon the condition in life of the traveler,—his calling, his habits, his tastes, the

probably as good as can be given: "The term 'baggage' means such goods and chattels as the convenience or comfort, the taste, the pleasure, or the protection, of passengers generally makes it fit and proper for the passenger in question to take with him for his personal use, according to the wants or habits of the class to which he belongs, either with reference to the period of the transit, or the ultimate purpose of the journey." <sup>364</sup> In *Hawkins v. Hoffman*, <sup>365</sup> it was suggested as a test that whatever is usually carried as baggage should be so considered. Brownson, J., said: "I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing or very little with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing tackle, they would undoubtedly fall within the term 'baggage,' because they are usually carried as such. This is, I think, a good test for determining what things fall within the rule." <sup>366</sup>

length or shortness of his journey, and whether he travels alone or with a family. If we agree, further, with Judge Story, and say that the articles of necessity or of convenience must be such as are usually carried by travelers for their personal use, we are still at fault, because there is, in no state of this Union, nor in any part of any one state, any settled usage as to the baggage which travelers carry with them for their personal use. The quantity and character of baggage found to accompany passengers are as various as are the countenances of the travelers."

<sup>364</sup> Lawson, Bailm. § 272.

<sup>365</sup> 6 Hill, 586.

<sup>366</sup> The right of a traveler to recover of a carrier for lost baggage is not limited to such apparel or other articles as he expects to need or use by the way, but extends to such baggage as is ordinarily carried by passengers. The plaintiff purchased in New York, and checked over defendant's road, as baggage, a trunk and contents, consisting of wearing apparel for himself and wife, articles for members of his family, and cloth for some dresses, including one for his landlady. The trunk was lost, and, in an action to recover the value of it and contents, *held*, that defendant was liable, except for the cloth purchased for landlady. *Dexter v. Railroad Co.*, 42 N. Y. 326. Damages may be assessed for such articles of necessity and convenience as passengers usually carry for their personal use, comfort, instruction, amuse-

*Same—Illustrations—Articles Held to be Baggage.*

The following articles have been held to constitute baggage: Clothing;<sup>367</sup> cloth and materials intended for clothing;<sup>368</sup> rifles;<sup>369</sup> pistols;<sup>370</sup> guns, when for sporting purposes;<sup>371</sup> bedding, when passenger is required to provide it,<sup>372</sup> but not otherwise;<sup>373</sup> tools of me-

ment, or protection, having regard to the length and object of their journeys. *Parmelee v. Fischer*, 22 Ill. 212. "To the extent that articles taken by him for his personal use when traveling exceed in quantity and value such as are ordinarily or usually taken by passengers of like station, and pursuing like journeys, they are not baggage, for which the carriers are, by general law, responsible as insurers." *Railroad Co. v. Fraloff*, 100 U. S. 24. A baggage check is prima facie evidence that the owner was a passenger, and that the carrier received his baggage. *Chicago, R. I. & P. R. Co. v. Clayton*, 78 Ill. 616, 618; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; *Davis v. Railroad Co.*, 10 How. Prac. 330; *Davis v. Railroad Co.*, 22 Ill. 278; *Atchison, T. & S. F. R. Co. v. Brewer*, 20 Kan. 669; *Kansas Pac. Ry. Co. v. Montelle*, 10 Kan. 119. A check is evidence of delivery of a trunk. *Dill v. Railroad Co.*, 7 Rich. Law, 158.

<sup>367</sup> *Dexter v. Railroad Co.*, 42 N. Y. 326; *Toledo, W. & W. Ry. Co. v. Hammond*, 33 Ind. 379, 382; *Dibble v. Brown*, 12 Ga. 217, 225; *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402. \$10,000 worth of laces (*Railroad Co. v. Fraloff*, 100 U. S. 24) and a servant's livery (*Meux v. Railroad Co.* [Q. B.: Oct., 1895]) have been held to be baggage.

<sup>368</sup> *Mauritz v. Railroad Co.*, 23 Fed. 765, 21 Am. & Eng. Ry. Cas. 286, 292; *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453; *Duffy v. Thompson*, Id. 178.

<sup>369</sup> *Bruty v. Railroad Co.*, 32 U. C. Q. B. 66; *Davis v. Railroad Co.*, 10 How. Prac. 330.

<sup>370</sup> *Davis v. Railroad Co.*, 22 Ill. 278. Where a Chicago grocer, who went into the country in quest of butter, sought to recover of a carrier the value of two revolvers as part of his baggage, which was lost by the company, it was held, with due regard to the habits and condition in life of the passenger, that more than one revolver was not reasonably necessary for his personal use and protection. *Chicago, R. I. & P. R. Co. v. Collins*, 56 Ill. 212. But, in *Woods v. Devin*, 13 Ill. 746, a passenger was allowed to recover for the loss of a pocket pistol and a pair of dueling pistols contained in his carpetbag with other baggage.

<sup>371</sup> *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453.

<sup>372</sup> *Hirschsohn v. Packet Co.*, 34 N. Y. Super. Ct. 521.

<sup>373</sup> *Connolly v. Warren*, 106 Mass. 146; *Macrow v. Railroad Co.*, L. R. 6 Q. B. 612. *Contra*, *Ouimit v. Henshaw*, 35 Vt. 605. And see *Parmelee v. Fischer*, 22 Ill. 212.



chanics;<sup>374</sup> surgical instruments;<sup>375</sup> watches and jewelry, when intended to be worn;<sup>376</sup> opera glasses or telescopes;<sup>377</sup> dressing cases;<sup>378</sup> books and manuscripts;<sup>379</sup> merchandise, where the fact is disclosed, or the articles so packed that their nature is obvious;<sup>380</sup> carpets;<sup>381</sup> money for expenses;<sup>382</sup> a commercial traveler's price book,<sup>383</sup> etc.

<sup>374</sup> *Davis v. Railroad Co.*, 10 How. Prac. 330; *Porter v. Hildebrand*, 14 Pa. St. 129. A reasonable quantity of his tools is proper baggage for a mechanic working as a watchmaker and jeweler. What such a reasonable quantity is, is a question for the jury. *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 34 Kan. 502, 9 Pac. 225.

<sup>375</sup> *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 262. A dentist's instruments. *Brock v. Gale*, 14 Fla. 523.

<sup>376</sup> *McCormick v. Hudson R. Co.*, 4 E. D. Smith (N. Y.) 181; *Torpey v. Williams*, 3 Daly (N. Y.) 162; *McGill v. Rowand*, 3 Pa. St. 451; *Jones v. Voorhees*, 10 Ohio, 145; *Coward v. East Tennessee R. Co.*, 16 Lea, 225; *American Contract Co. v. Cross*, 8 Bush (Ky.) 472. A man traveling alone, and carrying in his trunk, for transportation, a quantity of lady's jewelry, cannot recover for the loss thereof against a common carrier. *Metz v. California Southern R. Co.*, 85 Cal. 329, 24 Pac. 610.

<sup>377</sup> *Toledo, W. & W. Ry. Co. v. Hammond*, 33 Ind. 379; *Cadwallader v. Grand Trunk R. Co.*, 9 L. C. 169.

<sup>378</sup> *Cadwallader v. Grand Trunk R. Co.*, 9 L. C. 169.

<sup>379</sup> *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85; *Hopkins v. Westcott*, 6 Blatchf. 64, Fed. Cas. No. 6,692; *Doyle v. Kiser*, 6 Ind. 242. See, also, post, notes 393, 394.

<sup>380</sup> *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *Sloman v. Railroad Co.*, 67 N. Y. 208; *Hellman v. Holladay*, 1 Woolw. 365, Fed. Cas. No. 3,640. Where the carrier has knowledge that the contents of the trunk or package delivered for transportation are merchandise, and not personal baggage, and accepts it, he becomes liable for it as a common carrier. *Hannibal R. Co. v. Swift*, 12 Wall. 362; *Waldron v. Chicago & N. W. R. Co.*, 1 Dak. 351, 46 N. W. 456; *Texas, etc., R. Co. v. Capps*, 18 Cent. Law J. 211.

<sup>381</sup> Where a passenger delivered his trunk and a piece of carpeting to the baggage master of a railroad train, and received a check for his trunk, but was told that no check was necessary for the carpet, as it would go safely, it was held that the company was liable for the loss of the carpet, although, by the printed rules of the company, the baggage master was forbidden to receive, as a passenger's baggage, articles of merchandise. *Miter v. Pacific R. Co.*, 41 Mo. 503.

<sup>382</sup> *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332 (but cf. *Davis v. Michigan*

<sup>383</sup> *Gleason v. Transportation Co.*, 32 Wis. 85.



*Same—Articles Held not to Constitute Baggage.*

Under the circumstances of each particular case, the following articles have been held not to constitute baggage: Bedding, household goods, etc.;<sup>884</sup> money not intended for personal use;<sup>885</sup> cloth for a dress intended for a third person;<sup>886</sup> presents;<sup>887</sup> toys;<sup>888</sup> medicines, handcuffs and locks;<sup>889</sup> quantities of watches;<sup>890</sup> bullion, jewelry, etc., not intended to be worn;<sup>891</sup> samples of traveling sales-

Cent. R. Co., 22 Ill. 278; Merrill v. Grinnell, 30 N. Y. 594; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85; Hutchings v. Western & A. R. R. Co., 25 Ga. 61; Bomar v. Maxwell, 9 Humph. (Tenn.) 621; Doyle v. Kiser, 6 Ind. 242. In Grant v. Newton, 1 E. D. Smith (N. Y.) 95, it was held that the liability of a passenger carrier for baggage lost through his negligence does not extend to money, even if no more than sufficient for traveling expenses, contained in the trunk of a passenger. In Merrill v. Grinnell, 30 N. Y. 594, upon the question of a reasonable amount of money for traveling purposes, it was held that the "amount must be measured, not alone by the requirements of the transit over a particular part of the entire route to which the line of one class of carriers extends, but must embrace the whole of the contemplated journey, and includes such an allowance for accidents or sickness, and for sojourning by the way, as a reasonably prudent man would consider it necessary to make." In this case, \$800 in gold coin in the passenger's trunk was not considered to be too large an amount, the intended journey being from Hamburg to New York and San Francisco.

<sup>884</sup> Connolly v. Warren, 106 Mass. 146; McCrow v. Railroad Co., 1 L. R. 6 Q. B. 612; Texas & P. Ry. Co. v. Ferguson, 9 Am. & Eng. R. Cas. 395. See *supra*, note 372.

<sup>885</sup> Orange County Bank v. Brown, 9 Wend. 85; Weed v. Saratoga & S. R. Co., 19 Wend. (N. Y.) 534; Whitmore v. The Caroline, 20 Mo. 513; Jordan v. Fall River R. Co., 5 Cush. 69; Dunlap v. International Steamboat Co., 98 Mass. 371; Dibble v. Brown, 12 Ga. 217; Davis v. Michigan Southern & N. I. R. Co., 22 Ill. 278; Hutchings v. Western & A. R. R., 25 Ga. 61. Money carried in a passenger's trunk for transportation merely, and not for traveling expenses, is not baggage; and, if the carrier is not informed of its presence, he is not liable for its loss. Orange County Bank v. Brown, 9 Wend. 85.

<sup>886</sup> Dexter v. Syracuse, B. & N. Y. R. Co., 42 N. Y. 326.

<sup>887</sup> Nevins v. Bay State Steamboat Co., 4 Bosw. (N. Y.) 225; The Ionic, 5 Blatchf. 538, Fed. Cas. No. 7,059.

<sup>888</sup> Hudston v. Railroad Co., 10 Best & S. 504 (a child's rocking horse).

<sup>889</sup> Bomar v. Maxwell, 9 Humph. (Tenn.) 620.

<sup>890</sup> Belfast, etc., R. Co. v. Keys, 9 Ill. L. Cas. 556.

<sup>891</sup> Cincinnati & C. A. L. R. Co. v. Marcus, 38 Ill. 219; Nevins v. Bay State Steamboat Co., 4 Bosw. (N. Y.) 225; Steers v. Liverpool, N. Y. & P. S. S. Co., 57 N. Y. 1; Michigan Cent. R. Co. v. Carrow, 73 Ill. 348.

men;<sup>392</sup> deeds and documents;<sup>393</sup> valuable papers;<sup>394</sup> engravings;<sup>395</sup> and many other articles.<sup>396</sup>

*Effect of Custom and Usage.*

Evidence of custom and usage is relevant on the question of what constitutes baggage. If a carrier, either expressly or by custom and usage, holds itself out as willing to carry for its passengers, as baggage, or without additional compensation, articles not ordinarily regarded as baggage, it is clearly liable as a common carrier of such articles; for it may well be that such offer or holding out was the main inducement in the selection of that particular carrier's line, or, indeed, for the journey itself.<sup>397</sup>

*Liability for Merchandise Shipped as Baggage.*

While common carriers of passengers are bound to carry the passenger's baggage, they are not bound to carry with the passenger

<sup>392</sup> *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586; *Pennsylvania Co. v. Miller*, 35 Ohio St. 541; *Texas, etc., R. Co. v. Capps*, 16 Am. & Eng. R. Cas. 118; *Alling v. Boston & A. R. Co.*, 126 Mass. 121; *Stimson v. Connecticut R. R. Co.*, 98 Mass. 83.

<sup>393</sup> *Phelps v. Railway Co.*, 19 O. B. (N. S.) 321.

<sup>394</sup> *Phelps v. Railway Co.*, 19 C. B. (N. S.) 321; *Thomas v. Great Western R. Co.*, 14 U. C. Q. B. 389.

<sup>395</sup> *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225.

<sup>396</sup> A passenger took a dog with him into a coach, but was required by the brakeman to put the dog in the baggage car; the plaintiff paying the baggageman for its transportation. A rule of the carrier, of which the plaintiff had no notice, provided: "Live animals are allowed as baggageman's perquisites." The dog was lost by being delivered by the baggage man to the wrong person. It was held that plaintiff could recover its value from the carrier. *Cantling v. Hannibal & St. J. R. Co.*, 54 Mo. 385. Stage properties, etc., have been held not to be baggage. *Oakes v. Northern Pac. R. Co.*, 20 Or. 392, 26 Pac. 230. Neither is Masonic regalia. *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225. Nor a lady's jewelry (for a man). *Metz v. California South. R. Co.*, 85 Cal. 329, 24 Pac. 610. Nor a sacque, muff, and napkin ring (for a man). *Chicago, R. I. & P. R. Co. v. Boyce*, 73 Ill. 510. See *Kansas City, M. & B. R. Co. v. Higdon*, 94 Ala. 286, 10 South. 282. See, also, *Honeyman v. Oregon & C. R. Co.*, 13 Or. 352, 10 Pac. 628.

<sup>397</sup> *Dibble v. Brown*, 12 Ga. 517. But see *Alling v. Railroad Co.*, 126 Mass. 121. The course of business and the practice of a railroad company in respect to the custody of baggage passing over its line, and to be transferred to a connecting road, is of great importance in determining the nature of its liability therefor. Whether a bed, pillows, bolster, and bed quilts, belonging to

anything that is not, in a legal sense, baggage.<sup>398</sup> Freight trains and express facilities are provided for the transportation of such articles, and the carrier is entitled to compensation therefor. However, if the carrier voluntarily receives for transportation with the passenger, as baggage, articles which are not baggage, the fare paid by the passenger is compensation for both, and the carrier is liable as a common carrier, just as if the articles carried were actually and technically baggage.<sup>399</sup> Where the carrier or his agent is expressly notified that the articles are not baggage, and nevertheless receives them, no question can arise. But notice that the articles are not baggage may be implied where the goods are so packed that their nature is obvious.<sup>400</sup> Thus, where a roll of carpet was received

a poor man, who is moving with his family, carried along with him in a railroad train, and packed in his trunk or box containing his clothing, are baggage or not, is a question to be decided by the jury, taking into consideration the particular circumstances of the case, and the use, quality, value, and kind of articles in question. *Quimit v. Henshaw*, 35 Vt. 605.

<sup>398</sup> *Pfister v. Railroad Co.*, 70 Cal. 169, 11 Pac. 686; *Norfolk & W. R. Co. v. Irvine*, 84 Va. 553, 5 S. E. 532; *Id.*, 85 Va. 217, 7 S. E. 233.

<sup>399</sup> *Jacobs v. Tutt*, 33 Fed. 412. In *Stoneman v. Erie R. Co.*, 52 N. Y. 429, *Peckham, J.*, said: "I think it safe to say that, if the carrier knew or had notice of the character of the goods taken as baggage, and still undertook to transport them, he is liable for their loss, although they are not traveler's baggage." *Waldron v. Chicago & N. W. R. Co.*, 1 Dak. 351, 46 N. W. 456.

<sup>400</sup> *Thomp. Carr.* 523; *Waldron v. Chicago & N. W. R. Co.*, 1 Dak. 351, 46 N. W. 456; *Butler v. Hudson R. R. Co.*, 3 E. D. Smith, 571. It seems necessary to charge the carrier or his servant with actual knowledge that the thing carried was merchandise, and not luggage. *Wood, Ry. Law*, 1528. If a carrier knowingly received from a passenger articles as baggage which are not properly classed as such, either with or without extra charge therefor, it will be liable for their loss, although without its fault. *Oakes v. Northern Pac. R. Co.*, 20 Or. 392, 26 Pac. 230. For cases where extra payment was made, see *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 39 Fed. 417; *Glasco v. New York Cent. R. Co.*, 36 Barb. 557; *Sloman v. Great Western R. Co.*, 67 N. Y. 208; *Perley v. New York Cent. & H. R. R. Co.*, 65 N. Y. 374; *Millard v. Missouri, K. & T. R. Co.*, 86 N. Y. 441; *Hellman v. Holladay*, 1 Woolw. 365, Fed. Cas. No. 6,340. But see *Hamburg-American Packet Co. v. Gattman*, 127 Ill. 598, 20 N. E. 662. Where the baggage master of a railroad company accepts extra baggage, with the understanding with the passenger that extra payment shall be made for the transportation thereof, the company becomes responsible, as common carrier, for the delivery of such extra baggage. *Strouss v. Railway Co.*, 17 Fed. 209. The mere payment of extra com-

as baggage, the carrier was held liable for its loss.<sup>401</sup> And, where poles, ropes, and canvas constituting a tent belonging to a passenger were accepted as baggage for transportation, it was held that the

compensation for extra baggage does not convert such baggage into freight. *Hamburg-American Packet Co. v. Gattman*, *supra*. "If the plaintiff had carried these articles exposed, or had packed them in shape of merchandise, so the company might have known what they were, and they had chosen to treat them as personal luggage, and carried them without demanding any extra remuneration, they would have been responsible for the loss." Per Parke, B., in *Great Northern R. Co. v. Shepherd*, 8 Exch. 30. A carrier who checks a trunk containing a stock of jewelry, knowing or believing that such is its contents, is liable the same as though the trunk contained wearing apparel. *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 39 Fed. 417. Where property received on a passenger train is not represented to be baggage, and is not packed so as to assume that appearance, the carrier's responsibility for safe carriage is the same as though it were shipped on a freight train. *Hannibal R. R. v. Swift*, 12 Wall. 262. The fact that a package was marked "Glass," and resembled a package of merchandise, is insufficient to show an undertaking to carry such merchandise as baggage. *Cahill v. Railroad Co.*, 10 C. B. (N. S.) 154, 13 C. B. (N. S.) 818. "The principle to be extracted from the cases very clearly excludes merchandise, as such, in the idea of baggage, for which the carrier was responsible, and therefore, unless it is paid for otherwise than in the price of the passenger's ticket, the carrier is not liable for its loss, unless caused by his negligence. Of course, it is not meant that compensation for the freight should actually have been paid; but, to make the common carrier an insurer of the goods, it is essential that the goods be carried for a reward, and therefore, if the owner undertake to carry merchandise in the character of baggage, or to conceal money in other parcels, and thus to deprive the carrier of its just compensation, such merchandise or money must be at his own risk, unless lost or injured by the wrongful act of the carrier, because they are carried without that reward which is the foundation of the carrier's contract to insure, and which ought, in justice, to be in proportion of the risk." *Smith v. Boston & M. R. Co.*, 44 N. H. 325; *Gibbon v. Paynton*, 4 Burrows, 2298; *Batson v. Donovan*, 4 Barn. & Ald. 21. Where the agent of a railroad company checks the trunk of a jewelry salesman, containing his stock in trade, with full knowledge of its contents, and without any concealment having been practiced by the salesman, the latter, upon the loss of the trunk, may recover compensation as though the contents were ordinary baggage. *Jacobs v. Tutt*, 33 Fed. 412. This is so although the agent does not know that the trunk contains jewelry, if he has reason to believe that it does. *Central*

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<sup>401</sup> *Minter v. Pacific R. Co.*, 41 Mo. 503.

carrier must account for them as if they were personal luggage.<sup>402</sup> But the mere fact that a box is tendered, instead of a trunk,<sup>403</sup> or that a trunk is of the kind usually used by commercial travelers,<sup>404</sup> is not notice that they contain merchandise or samples. Baggage may well be carried in that manner, and, as it is not apparent what they do contain,<sup>405</sup> the carrier may rely on the implied representation that they contain only baggage. A passenger, by tendering a

Trust Co. v. Wabash, St. L. & P. Ry. Co., 39 Fed. 417. But, where a passenger has a valise containing merchandise checked over defendant's road without informing defendant's baggage master of its contents, defendant is not under obligation to transport it safely, although defendant's baggage masters at other stations may have previously checked the valise with knowledge of its contents. *Blumenthal v. Railroad Co.*, 79 Me. 550, 11 Atl. 605. Where property is checked as baggage which is not such, and the passenger seeks to hold the carrier liable for its loss as baggage, the burden of showing that the carrier had notice of the nature of the property rests upon the passenger. *Haines v. Railway Co.*, 29 Minn. 160, 12 N. W. 447. Where a carrier, with full knowledge that trunks offered for transportation contain merchandise, receives and checks them as baggage, the estoppel to claim that they are not baggage extends to the passenger as well as to the carrier; and therefore, if the carrier in such case keeps the trunks a sufficiently reasonable length of time for the presentation of the checks, and then, having been placed in a proper and suitable baggage room, they are destroyed by fire without the fault of the carrier, it is not liable, although it would have been if the trunks and their contents were treated as freight. *Hoeger v. Railway Co.*, 63 Wis. 100, 23 N. W. 435.

<sup>402</sup> *Chicago, R. I. & P. R. Co. v. Conklin*, 32 Kan. 55, 3 Pac. 762.

<sup>403</sup> *Belfast, etc., R. Co. v. Keys*, 9 Ill. L. Cas. 556.

<sup>404</sup> See *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348; *Humphreys v. Perry*, 13 Sup. Ct. 711. Goods and samples, constituting a commercial traveler's outfit, are to be considered personal baggage, where the carrier and passenger contracted with a full understanding of the nature of the property, and that it did not consist of ordinary apparel and things carried for use on the journey. *Dixon v. Richelieu Nav. Co.*, 15 Ont. App. 647, 39 Am. & Eng. R. Cas. 425. See, also, *Sloman v. Great Western R. Co.*, 67 N. Y. 208, reversing 6 Hun, 546.

<sup>405</sup> A baggage man having accepted, for transportation along with a passenger's baggage, a box obviously containing merchandise, the carrier is responsible for the transportation and delivery at the passenger's destination. *Butler v. Hudson R. R. Co.*, 3 E. D. Smith, 571; *Waldron v. Chicago & N. W. R. Co.*, 1 Dak. 351, 46 N. W. 456.



package to be carried as baggage, impliedly represents that it contains only baggage.<sup>406</sup> The carrier has a right to rely upon this representation without making any inquiries, and, if the package in fact contains merchandise, it operates as a fraud on the carrier,<sup>407</sup> and the latter is not liable as an insurer, but only as a gratuitous bailee; that is, for gross negligence.<sup>408</sup> If the carrier inquires as to the contents, the passenger must, of course, answer truly; and, if he refuses to answer, the carrier may refuse to transport the articles as baggage.<sup>409</sup>

<sup>406</sup> Michigan Cent. R. Co. v. Carrow, 73 Ill. 348; Humphreys v. Perry, 13 Sup. Ct. 711; Haines v. Railroad Co., 29 Minn. 160, 12 N. W. 447. Contra, Kuter v. Railroad Co., 1 Biss. 35, Fed. Cas. No. 7,955.

<sup>407</sup> "Whether any fraud in fact was intended, it is not necessary to inquire. The transaction was fraudulent in law, and this is sufficient, by all the authorities, to avoid any contract, whether express or implied. The fact that appellee offered, as common baggage, merchandise of extraordinary value, is a legal fraud, such as will excuse the performance of a contract." Michigan Cent. R. Co. v. Carrow, 73 Ill. 348. See, also, Blumenthal v. Railroad Co., 79 Me. 550, 11 Atl. 605, Hellman v. Holladay, 1 Woolw. 365, Fed. Cas. No. 6,340.

<sup>408</sup> Michigan Cent. R. Co. v. Carrow, 73 Ill. 348; Smith v. Boston & M. R. Co., 44 N. H. 325; Alling v. Boston & A. R. Co., 126 Mass. 121; Blumantle v. Fitchburg R. Co., 127 Mass. 322. And see Haines v. Chicago, etc., R. Co., 29 Minn. 160; Pennsylvania Co. v. Miller, 35 Ohio St. 541. In Cahill v. Railroad Co., 13 C. B. (N. S.) 818, it appeared that a passenger presented to the company, as luggage, a box containing only merchandise, but not exceeding in weight the limit prescribed for personal luggage. No information was given to the company of the contents of the box. Held, that he could not recover for the loss of the box. Chief Justice Cockburn, in this case, said: "If a railway company \* \* \* choose to take, as ordinary luggage, that which they know to be merchandise, I quite agree that it is not competent for them, in the event of a loss, to claim exemption from liability on the ground that the article consists of merchandise, and not of ordinary luggage. But, on the other hand, if a passenger, who knows, or ought to know, that he is only entitled to have his ordinary personal luggage carried free of charge, chooses to carry with him merchandise, for which the company are entitled to make a charge, he cannot claim to be compensated in respect of any loss or injury by the company to whom he has abstained from giving notice of the contents." See, also, Great Northern Ry. Co. v. Shepherd, 8 Exch. 30.

<sup>409</sup> Railroad Co. v. Fraloff, 100 U. S. 24; Norfolk & W. R. Co. v. Irvine, 84 Va. 553, 5 S. E. 532; Id., 85 Va. 217, 7 S. E. 233.

*Passenger must be Owner.*

A passenger carrier's contract is to carry the passenger safely, together with such articles and money as are properly contained in the baggage which he brings with him; but he does not contract to carry anything which the passenger brings with him, in the shape of baggage, which in fact and law is not baggage, but merchandise or money, which he cannot ask a carrier to receive in that form.<sup>410</sup> "Baggage," as has been seen, signifies such articles of convenience or necessity as are carried for the passenger's personal use.<sup>411</sup> It follows, therefore, that the carrier is not liable for articles carried as baggage, in which the passenger has neither the general ownership nor a special interest, for in such case the articles would not be carried for the passenger's personal use. Thus it has been held that a statute<sup>412</sup> providing for an allowance of baggage to each railroad passenger does not permit the passenger to take the baggage of another. In this case the plaintiff had procured the passenger to make the journey for the express purpose of transporting the property in question. The court said: "This allowance is a personal privilege extended to a passenger to enable him to carry his own baggage. It was not the purpose of the legislature, in adopting this provision, to permit a passenger to take with him, as his own, the baggage of another person, whether as a matter of accommodation, or for compensation paid. Otherwise passengers might engage in the business of baggage carrying, each to the extent of 100 pounds. Such a conclusion we think would be absurd."<sup>413</sup> So it has been held that a carrier of passengers with their baggage is not liable for the loss of money of one passenger contained in a

<sup>410</sup> *Dunlap v. Steamboat Co.*, 98 Mass. 371.

<sup>411</sup> In *Michigan Southern & N. I. R. Co. v. Oehm*, 56 Ill. 293, it is held that defendant was not liable for the loss of masquerade costumes which plaintiff was carrying in her trunk, to be used by others at a ball. The plaintiff having shipped, as personal baggage, merchandise to be used in her trade, and in no sense whatever capable of being considered as personal baggage, the company, not having notice of the contents of the trunks, were released from their liability as common carriers.

<sup>412</sup> *Sayles Civ. St. art.* 425Bb.

<sup>413</sup> *Andrews v. Railroad Co.*, 25 S. W. 1040.

valise which another passenger, with the knowledge of the first, delivers as his own baggage, and the carrier receives as such.<sup>414</sup> So where the plaintiff's servant goes on in advance, taking with him his master's baggage, the carrier is not liable for its loss, if it was accepted as the baggage of the servant.<sup>415</sup> But members of the same family, traveling together, may carry each other's effects.<sup>416</sup> And it has been held that where the plaintiff went on in advance, leaving his baggage to be brought seven days later by his wife, with her own baggage, defendant was liable to plaintiff for its loss.<sup>417</sup>

Of course, it is not necessary that the passenger be the absolute owner of the articles carried. It is sufficient that he has a special interest in them; as, for instance, where they have been hired or borrowed for use upon the journey.

*Same—Passenger Need not Accompany Baggage.*

In cases where the passenger accompanies his baggage, the fare charged for his passage includes compensation for its transportation, and the carrier becomes liable for its safe delivery, without additional compensation. If the passenger does not accompany it, the carrier may claim compensation in advance, or may postpone his claim until the delivery, and rely on his lien, or on the personal responsibility of the owner. In either case he is liable as a common carrier. The actual payment of the freight in one case, and the actual liability and lien for its payment in the other, constitute the consideration for the undertaking.<sup>418</sup> The fare paid by a passenger over a railroad is the compensation for his carriage, and for the transportation at the same time of such baggage as he may require for his personal convenience and necessity during his journey. Baggage subsequently forwarded by his direction, in the absence of any special agreement of the carrier, or of negligence on his part, is liable, like any other article of merchandise, to the pay-

<sup>414</sup> *Dunlap v. Steamboat Co.*, 98 Mass. 371.

<sup>415</sup> *Becher v. Railroad Co.*, L. R. 5 Q. B. 241.

<sup>416</sup> *Dexter v. Railroad Co.*, 42 N. Y. 326.

<sup>417</sup> *Curtis v. Railroad Co.*, 74 N. Y. 116.

<sup>418</sup> *The Elvira Harbeck*, 2 Blatchf. 336, Fed. Cas. No. 4,424; *Wilson v. Railroad Co.*, 57 Me. 138. It makes no difference that nothing was said at the time the baggage was delivered about compensation. The carrier is, *prima facie*, entitled to it. *Lawson*, Bailm. § 280.

ment of the usual freight.<sup>419</sup> "It is implied in the contract that the baggage and the passenger go together. \* \* \* If its transmission may be delayed two days, and the carrier is required to take it without any compensation, save the fare paid by the passenger who had preceded it, it may equally be delayed weeks or months, and the carrier required to forward it without any additional pay. It presents a different question if the delay is caused by the fault of the carrier, or there is a special agreement with him, or his authorized agent, for the subsequent transportation of the passenger's baggage."<sup>420</sup> In the absence of a special agreement, or negligence on the part of the carrier, a passenger is liable for freight charges on his baggage, unless he accompanies it. But if a passenger pays his fare, and his baggage is sent forward pursuant to an agreement, and as a part of the consideration moving from the company for the fare prepaid by the passenger, the company is liable as a common carrier whether the baggage is forwarded on the same, the preceding, or a subsequent train, and the owner is not liable for additional charges.<sup>421</sup>

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<sup>419</sup> *Wilson v. Railroad Co.*, 56 Me. 60; *Graffam v. Railroad Co.*, 67 Me. 234. Where the passenger, with the consent of the carrier, stops over, and permits his baggage to go on, the carrier is liable as an insurer until a reasonable time elapses after the baggage has reached its destination without the passenger calling for it. *Logan v. Railroad Co.*, 11 Rob. (La.) 21; *Chicago, R. I. & P. R. Co. v. Fairclough*, 52 Ill. 106. But see *Laffrey v. Grummond*, 74 Mich. 186.

<sup>420</sup> *Wilson v. Railroad Co.*, 56 Me. 60. Railroad companies are not obliged to receive as baggage the trunk of one who does not go by the same train. *Graffam v. Railroad Co.*, 67 Me. 234.

<sup>421</sup> *Warner v. Railroad Co.*, 22 Iowa, 166. See, also, *Shaw v. Railroad Co.*, 40 Minn. 144, 41 N. W. 548. In *Collins v. Railroad Co.*, 10 Cush. 506, it appeared that merchandise was accepted as baggage by the carrier, on the understanding that the owner was to accompany it. The owner, however, went on a subsequent train. The goods reached their destination, but were stolen before the owner arrived. It was held that the carrier was not liable. The court said: "It is easy to perceive that the omission of the plaintiff to accompany them, as he informed defendant's agent he should, contributed materially to the loss, and that what might have been a very proper and suitable disposition of them at the station at Lawrence, under the reasonable belief that the owner of them was present to take charge of them, might have been one of hazard, and exposure to loss, in his absence."



*Baggage in Custody of Passenger.*

It has already been seen that common carriers of goods are liable as insurers, only when the goods have been delivered into their exclusive custody.<sup>422</sup> The question most frequently arises in respect to baggage retained in the custody of the passenger, or at least carried in the same car or stateroom, and more or less under his supervision. Three classes of cases may be considered:

(a) Where the passenger retains in his possession, without notice to the carrier, articles which are not technically baggage, the carrier is not liable for their loss, even by negligence.<sup>423</sup> Under the ordinary contract of carriage, a carrier of passengers makes no contract and enters into no duty as to articles not forming part of a passenger's ordinary baggage or personal equipment. Beyond its contract, a common carrier is under no greater obligations to passengers than the rest of the community.<sup>424</sup> Where, therefore, a passenger carried \$16,000 worth of bonds on his person, without notice to or knowledge by the carrier, and they were violently taken from him by robbers, without gross negligence or fraud on the part of the carrier, the latter was held not liable.<sup>425</sup> So where a passenger went upon defendant's train, carrying \$4,000 with him, and during the transit the train fell through a bridge, and the passenger and the \$4,000 were burned in the wreck, the carrier was held not lia-

<sup>422</sup> See ante, p. 356.

<sup>423</sup> *Hillis v. Railroad Co.*, 72 Iowa, 228, 33 N. W. 643. *First Nat. Bank v. Railroad Co.*, 20 Ohio St. 259; *Weeks v. Railroad Co.*, 72 N. Y. 50.

<sup>424</sup> *Henderson v. Railroad Co.*, 20 Fed. 430; *Id.*, 123 U. S. 61, 8 Sup. Ct. 60. A railroad company is not liable in damages for a loss resulting to a passenger from its refusal to stop the train upon which he was riding, short of a usual station, to enable him to recover a hand bag which he was carrying with him, and which he dropped from a window of the car while attempting to lower the sash. *Henderson v. Railroad Co.*, supra.

<sup>425</sup> *Weeks v. Railroad Co.*, 72 N. Y. 50, 56. "It is apparent that, if the carrier is liable, in such case, for a loss by robbery, it is liable also for a loss by theft by strangers (see *Abbott v. Bradstreet*, 55 Me. 530), or for loss resulting from negligence in any way, no matter what the character of the valuables, or the amount of them borne upon the person, and in the sole care and custody of the passenger. It is, then, seen that the carrier of passengers, against its will, with no knowledge or notice of the charge and risk put upon it, becomes more, in fact, than a carrier of passengers,—it becomes an 'express' carrier with unusual burdens." *Id.*



ble.<sup>426</sup> In this case it was sought to hold the company liable on two grounds: (1) Under the maxim, "*Sic utere tuo ut alienum non lædas;*" and (2) as a common carrier. Scott, J., pointed out that the first ground of liability relied upon was not based upon any contract between the parties, nor upon any liability of the company as a common carrier, but only sought a recovery on the ground that the defendant negligently so conducted its business, in running its train, as to destroy plaintiff's property. "Yet," said he, "it proceeds on the important assumption that plaintiff's money was lawfully where it was at the time when the catastrophe occurred; that is, that McElroy was a passenger on defendant's train of cars, had a right to carry the money with him, and, without notice to defendant, to subject it to such perils as might arise from the negligence of defendant's servants in the management of the train. Had the money not been in the defendant's car, it would not have been subjected to the peril which caused its destruction, and the question whether it was lawfully there necessarily involves a consideration of the second proposition. Damage resulting from the negligence of another will not, in all cases, constitute a cause of action. Should A., through negligence, burn his own house, and with it the property of B., placed there without the knowledge or consent of A., we apprehend B. could not hold A. liable for the loss. We cannot, therefore, ignore the fact that the carrying of the money in defendant's car was an essential element in the circumstances occasioning the loss, nor the fact that it was so carried by a person whose only right to be there was in virtue of his character as a passenger.

\* \* \* We do not call in question the right of a passenger to carry about his person, for the mere purpose of transportation, large sums of money, or small parcels of great value, without communicating the fact to the carrier, or paying anything for the transportation. But he can only do so at his own risk, in so far as the act of third persons, or even ordinary negligence on the part of the carrier or his servants, is concerned. For this secret method of transportation would be fraud upon the carrier, if he could thereby be subjected to an unlimited liability for the value of the parcels never delivered to him for transportation, and of which he has no knowl-

<sup>426</sup> First Nat. Bank of Greenfield v. Marietta & C. R. Co., 20 Ohio St. 259.

edge, and has therefore no opportunity to demand compensation for the risk incurred. No one could reasonably suppose that a liability which might extend indefinitely in amount would be gratuitously assumed, even though the danger to be apprehended should arise from the inadvertent negligence of the carrier himself."

(b) When proper baggage is delivered to the carrier, but, for the passenger's convenience, it is transported in the same car or stateroom, where he can have access to it, the carrier is liable as an insurer.<sup>427</sup> Passengers have a right to have articles required for present use in traveling carried with them. It is an undoubtedly well-settled general rule that a carrier of passengers has the right to establish any reasonable regulation which he considers necessary to secure the

<sup>427</sup> *Van Horn v. Kermit*, 4 E. D. Smith, 453; *Dunn v. Steam-Boat Co.*, 58 Hun, 461, 12 N. Y. Supp. 406; *Mudgett v. Steamboat Co.*, 1 Daly, 151; *Gore v. Transportation Co.*, 2 Daly, 254; *Macklin v. Steamboat Co.*, 7 Abb. Prac. (N. S.) 229; *Walsh v. The H. M. Wright*, 1 Newb. 494, Fed. Cas. No. 17,115. But see *Williams v. Keokuk Co.*, 3 Cent. Law J. 400; *Gleason v. Transportation Co.*, 32 Wis. 85. In *Mudgett v. Steamboat Co.*, supra, it was held that a mere supervision of one's baggage is not sufficient to discharge the carrier. There must either exist the *animo custodiendi* on the part of the traveler, to the exclusion of the carrier, or he must be guilty of such negligence as discharges the latter from his general obligation. *Cohen v. Frost*, 2 Duer, 335, was criticised. In *McKee v. Owen*, 15 Mich. 115, property was stolen from a stateroom on a steamer at night. There was no evidence of negligence. The court was evenly divided upon the question of defendant's liability. *Cooley and Christiancy, JJ.*, concurred in holding the defendant liable as a carrier to the same extent as an innkeeper for a similar loss by a guest occupying a room at his inn. *Campbell, J.*, and *Martin, C. J.*, concurred in denying liability. Other cases, however, hold that a carrier is not liable, as an insurer, for baggage of a passenger kept in his own possession in his stateroom, but is liable only for negligence, like other bailees for hire. See *American Steamship Co. v. Bryan*, 83 Pa. St. 446. The conflict is upon the question of what constitutes a delivery to the carrier. See post, p. 396. A railway company insures the safety of each passenger's baggage, carrying such baggage being merely incidental to the contract for carrying its owner. This liability continues, even when the passenger takes his baggage into a sleeping car, and gives it in charge of the porter thereof. A railway company cannot limit its liability by any special arrangement with the sleeping-car company, because, so long as the sleeper forms part of the train, negligence on the part of the sleeping-car agents is the negligence of the railway company running its train. *Louisville, N. & G. S. R. Co. v. Katzenberger*, 16 Lea, 380, 1 S. W. 44. If a person, who has made a contract with a railroad corporation for his personal transportation from one

safety of the baggage of his passengers; and if the passenger knows of the regulation, and his baggage is lost through his neglect or refusal to comply with it, the carrier is not answerable. But in a well-considered opinion by Daly, J., in *Macklin v. New Jersey Steamboat Co.*,<sup>428</sup> that learned judge expressed the view that a regulation forbidding a passenger upon a steamboat from taking his baggage with him into his stateroom or private chamber, except at his own risk, is not a reasonable regulation, so far as it would apply to light baggage or hand satchels containing articles required for present use in travel, and cannot exonerate the carrier from liability for the loss of such baggage, when taken by the passenger to his room in disregard of the regulation. Upon this point the judge said: "When a passenger pays in addition for a separate or private room, or, as it is called, a 'stateroom,' in these boats, he does so to get greater and better accommodation, and for the privacy and security which it affords. If he has simply with him a valise,—a small, portable article, coming under the denomination of 'light baggage,' as it may be carried in the hand, and that, from its limited size, usually admits of little else than the clothing and toilet articles required for present use,—he has the right, where such is the general character of its contents, to take it with him into the chamber provided for him, and where he is to pass the night; and, having placed it there and locked the door, the obligation is upon the carrier to see that his property is not purloined or stolen. Any regulation, the effect of which would be to prevent him from doing this, would be unreasonable. It is essential to the traveler's convenience and comfort, and the law would not descend into the particularity of insisting that he should open the valise, and, taking out of it exactly what was the requisite for the night, lock it up, and then take it and deposit it in the baggage room for safe-keeping."<sup>429</sup>

place to another, takes a seat in a sleeping car, and there loses an article of personal baggage, through the negligence of a person in charge of the car, and without fault on his own part, it is no defense to an action against the corporation that the car was not owned by the defendant, but by a third person, who, by a contract with the defendant, provided conductors and servants, in the absence of evidence that the plaintiff had knowledge of these facts. *Kinsley v. Railroad Co.*, 125 Mass. 54.

<sup>428</sup> 7 Abb. Prac. (N. S.) 229.

<sup>429</sup> See, also, *Gleason v. Transportation Co.*, 32 Wis. 85, *Mudgett v. Steam-*

Delivery to the carrier, actual or constructive, is always essential, to charge the carrier with liability.<sup>430</sup> But there is much confusion and conflict in the cases as to what constitutes a sufficient delivery. Even as to proper baggage, if the passenger retains it *animo custodiendi*, the carrier is relieved of liability as an insurer, and is liable only for negligence.<sup>431</sup> In England the rule was stated to be that such circumstances must exist as "lead irresistibly to the conclusion that the passenger takes such personal control and charge of his property as altogether to give up all hold upon the company, before we can say the company, as carriers, are relieved from their liability in case of loss."<sup>432</sup> This language was used in a case where the carrier was held liable for the loss of a chronometer placed in a seat in a railway carriage. Cockburn, C. J., said further: "What really took place appears to be this: That by desire of the plaintiff the porter of the company placed this article in a carriage, upon a particular seat, which was to be reserved for the plaintiff. I am far from saying that no case can arise in which a passenger, having luggage which, by the terms of the contract, the company is bound to convey to the place of destination, can release the company from the care and custody of an article by taking it into his own immediate charge; but I think the circumstances should be very strong to show such an intention on the part of the passenger, and to relieve the company of their ordinary liability. And it is not because a part of the passenger's luggage, which is to be conveyed with him, is, by the mutual consent of the company and himself, placed with him in the carriage in which he travels, that the company are to be considered as released from their ordinary obligations. Nothing could be more inconvenient than that the practice of placing small articles, which it is convenient to the pas-

boat Co., 1 Daly, 151, *Gore v. Transportation Co.*, 2 Daly, 254. The views thus expressed are criticised in the case of *The R. E. Lee*, 2 Abb. (U. S.) 49, Fed. Cas. No. 11,690.

<sup>430</sup> See ante, p. 356. *Blanchard v. Isaacs*, 3 Barb. 388; *The R. E. Lee*, 2 Abb. (U. S.) 51, Fed. Cas. No. 11,690; *Tower v. Railroad Co.*, 7 Hill, 47. Neither a corporation nor an individual is responsible for neglect in protecting property of which he or it has not assumed the custody, or any relation of duty or trust in regard to it. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278.

<sup>431</sup> Post, p. 399.

<sup>432</sup> *Le Conteur v. Railroad Co.*, L. R. 1 Q. B. 54. Cf. *Kinsley v. Railroad Co.*, 125 Mass. 54.



senger to have about him, in the carriage in which he travels, should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safe carriage, it would follow that no one who has occasion to leave the carriage temporarily could do so consistently with the safety of his property. I cannot think, therefore, we ought to come to any conclusion which would have the effect of relieving the company, as carriers, from the obligation to carry safely, which obligation, for general convenience of the public, ought to attach to them." This case states the correct rule.<sup>433</sup> In *Pullman Palace-Car Company v. Freudenstein*,<sup>434</sup> the court said: "It is undoubtedly the law that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss; as, for instance, when a passenger's pocket is picked, or an overcoat or a satchel is taken from a seat occupied by him."<sup>435</sup>

<sup>433</sup> "The control and management of the car or of the train by the servants and employes of the company were not impeded or interfered with; and where no such interference is attempted, it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it, and keeps a watchful lookout for its safety." *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 262. The luggage of a passenger by railway, though never delivered to any servant of the company, but kept by the passenger during the journey, is, nevertheless, in point of law, in the custody of the company, so as to render them responsible for its loss. *Great Northern Ry. Co. v. Shepherd*, 8 Exch. 30.

<sup>434</sup> 3 Colo. App. 540, 34 Pac. 578.

<sup>435</sup> *Tower v. Railroad Co.*, 7 Hill, 47. A passenger on a railway train entered a car, having in a pocket of his overcoat a sum of money, and gave the overcoat to the porter without mentioning the money, and the porter hung the coat in the passenger's berth. Held, that the money was in his own custody and at his risk; and the fact that, soon afterwards, an accident overturned the car, and on the passenger making his way out, he told the porter and brakeman of the railway company that the money was in the car, put no liability for the money on the company, as gratuitous bailee or otherwise, and it was not, in such case, responsible for the loss of the money. The company had, in such case, a right to notice, in the outset, of this money, and to be paid accordingly if responsibility was to arise in case of accident; and the occurrence of the accident did not change the rule as to the degree of care required, even on the theory of a gratuitous bailment. *Hillis v. Railroad Co.*, 72 Iowa, 228, 33 N. W. 643.



Upon this theory, it is insisted by defendant that it cannot be liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot for a moment accede to this proposition. It is scarcely necessary to say that a person asleep cannot retain manual possession or control of anything. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care upon his own part is impossible. There is all the delivery which the circumstances of the case admit." So it is reasonably well settled in the case of carriers by water that the assignment of a stateroom to a passenger is "a designation of the place in which the traveler may put his ordinary baggage," and a deposit of it in such place is a sufficient delivery to charge the carrier with full liability for its safe delivery.<sup>436</sup>

The exemption from liability for losses caused by the act of the shipper<sup>437</sup> is peculiarly applicable in this class of cases. If the baggage is lost through the negligence of the passenger himself, the carrier is not liable. It is reasonable to presume that, with respect to articles placed in the car with the passenger, it was intended by both parties to be under the latter's personal inspection and care; at least, during that part of the journey in which the passenger might reasonably be expected to be in the carriage.<sup>438</sup>

<sup>436</sup> *Hutch. Carr.* § 700; *Mudgett v. Steamboat Co.*, 1 Daly, 151; *Gore v. Transportation Co.*, 2 Daly, 254; *Walsh v. The H. M. Wright*, 1 Newb. 494, *Fed. Cas. No.* 17,115; *Macklin v. Steamboat Co.*, 7 Abb. Prac. (N. S.) 229. But, in *Gleason v. Transportation Co.*, 32 Wis. 85, it was held that the deposit of baggage in an unlocked stateroom was not a delivery to the carrier, and therefore the latter was not liable for its loss by theft. The decision might well have been rested on the passenger's negligence. The court said the decision might have been otherwise had the stateroom been locked. It is difficult to see what bearing that fact has on the question of delivery. See, also, *American Steamship Co. v. Bryan*, 83 Pa. St. 446; *The R. E. Lee*, 2 Abb. (U. S.) 49, *Fed. Cas. No.* 11,690; *Del Valle v. The Richmond*, 27 La. Ann. 90; *Williams v. Packet Co.*, 3 Cent. Law J. 400; *Abbott v. Bradstreet*, 55 Me. 530; *Clark v. Burns*, 118 Mass. 275.

<sup>437</sup> *Ante*, p. 365.

<sup>438</sup> *Talley v. Railway Co.*, L. R. 6 C. P. 44. A passenger on a railroad, on leaving the car in which he was traveling, at a station, for the purpose of getting his dinner, inquired of an employé in the car whether his baggage would be safe if left in the car, and was told to leave it there, and that it would

(c) With respect to articles which would be proper baggage if delivered to the carrier, but which the passenger retains, *animo custodiendi*, upon or about his person, the carrier is liable, not as an insurer, but only for losses caused by its negligence.<sup>439</sup> "There is great force in the argument that where articles are placed, with the assent of the passenger, in the same carriage with him, and so in fact remain in his own control and possession, the wide liability of the common carrier which is founded on the bailment of the goods to him, and his being intrusted with the entire possession of them, should not attach, because the reasons which are the foundation of the liability do not exist. In such cases the obligation to take reasonable care seems naturally to arise, so that when loss occurred it would fall on the company only in the case of negligence in some part of the duty which pertained to them."<sup>440</sup> In this as

be perfectly safe. He left his baggage in the car, and, on his return, found that the car had been detached from the train, and his baggage removed to another car, where he could have a seat. On going to this car, he found only part of his baggage. No notice of the change had previously been given to him. Held, that this evidence would warrant a finding that the missing baggage was lost through the negligence of the railroad corporation. *Kinsley v. Railroad Co.*, 125 Mass. 54.

<sup>439</sup> *Clark v. Burns*, 118 Mass. 275; *Pullman Palace Car Co. v. Pollock*, 60 Tex. 120, 5 S. W. 814; *The Crystal Palace v. Vanderpool*, 16 B. Mon. 302. Where a passenger carried his coat into a car on his arm, and upon leaving the train left the coat in his seat, the carrier was held not liable. "The overcoat was not delivered into the possession or custody of the defendant, which is essential to its liability as carrier. \* \* \* If it were under any obligation to take charge of the article in question, \* \* \* ordinary care is all that can be exacted." *Tower v. Railroad Co.*, 7 Hill, 47. The fact that the passenger retains custody of his baggage relieves the carrier merely of his extraordinary liability as insurer. He still remains liable for negligence. *American Steamship Co. v. Bryan*, 83 Pa. St. 446; *Kinsley v. Railroad Co.*, 125 Mass. 54; *Williams v. Packet Co.*, 3 Cent. Law J. 400. Thus, a carrier has been held liable for baggage stolen from his stateroom while the passenger was asleep, where its watchman was negligent. *American Steamship Co. v. Bryan*, *supra*. Money carried during the day in a passenger's clothing, and placed under his pillow at night, is not in the custody of the carrier furnishing him a berth in a sleeping coach, within the rule that a carrier is liable for the value of the effects of travelers lost while in its custody for transportation. *Carpenter v. Railroad Co.*, 124 N. Y. 53, 26 N. E. 277.

<sup>440</sup> *Talley v. Railroad Co.*, L. R. 6 C. P. 44.

in the preceding case, negligence of the passenger causing the loss will, of course, relieve the carrier from liability.

All that is said in all the cases is not consistent with these conclusions. But, when considered in connection with their facts, the cases justify the conclusions.

*Sleeping-Car Companies.*

A sleeping-car company is not a carrier, either public or private. It carries no one. The transportation, not only of sleeping-car passengers, but of the sleeping car itself, is done by the railway company. It, and not the sleeping-car company, contracts for the carriage, and receives the compensation therefor. It should therefore assume the responsibilities of carrier. Neither is a sleeping-car company an innkeeper.<sup>441</sup> This is not saying, however, that a sleeping-car company is under no liability for the negligent loss or damage of its passengers' property. As laid down by the supreme court of Pennsylvania,<sup>442</sup> it is the duty of a sleeping-car company to use reasonable and ordinary care to prevent intruders picking pockets, and carrying off the clothes of passengers while asleep.<sup>443</sup> Whether such care was exercised under the circumstances is a question for the jury. Where the regulations require a watchman to stay in the aisle of the car continuously until danger is over, and he goes out of the aisle, even for a very few minutes, and during that

<sup>441</sup> Pullman's Palace Car Co. v. Smith, 73 Ill. 360. See ante, p. 262.

<sup>442</sup> Pullman Car Co. v. Gardner, 3 Penny. (Pa.) 78.

<sup>443</sup> Efron v. Car Co., 59 Mo. App. 641; Chamberlain v. Car Co., 55 Mo. App. 474; Pullman Palace Car Co. v. Freudenstein, 3 Colo. App. 540, 34 Pac. 578. A sleeping-car company is bound to use ordinary care to protect its passengers from the theft of such personal effects as they may reasonably carry with them. Lewis v. Car Co., 143 Mass. 267, 9 N. E. 615. And see Pullman Palace Car Co. v. Pollock, 69 Tex. 120, 5 S. W. 814; Stevenson v. Car Co. (Tex. Civ. App.) 26 S. W. 112; Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70. A sleeping-car company, so far as it renders service similar in kind to that of an innkeeper, is subject to the same liabilities. Pullman Palace Car Co. v. Lowe, 28 Neb. 239, 44 N. W. 226. Where a passenger in a sleeping car places an article of wearing apparel in the care of the porter, and it is stolen from the car, the sleeping-car company is liable therefor. Id. A passenger riding on a day parlor car of the Pullman Palace Car Company cannot recover from such company for the loss of personal effects which she has retained under her own personal control, where her own negligence has contributed to the loss. Whitney v. Car Co., 143 Mass. 243, 9 N. E. 619.

time a robbery occurs, if the jury believe that if he had been in his place of observation it would not have occurred without detection, the company is liable. The watching must be continuous and active. It may be proved, too, that another person was robbed on the same car on the same night, as bearing upon the question of negligence.\*

**SAME—LIABILITY FOR LOSS OR DAMAGE—AS ORDINARY BAILEES.**

**85. Common carriers are liable, as ordinary bailees for hire, for all losses caused by their failure to exercise ordinary care and skill, and for anything amounting to an absolute breach of contract.**

Common carriers, like other bailees for hire, are liable for all losses caused by their failure to exercise ordinary care. In addition to this liability for negligence, public policy has made them absolute insurers of the safety of the goods, except for losses caused by certain excepted perils.<sup>446</sup> Ordinarily, therefore, the question of negligence is not of primary importance, as the carrier is liable for losses, even by inevitable accident. But even where the loss is caused by an excepted peril, as the act of God, the carrier is liable, if his negligence contributed thereto,<sup>447</sup> and in other respects the liability of a common carrier does not differ from that of ordinary bailees for hire. "A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. He must guard the goods

\*Henderson v. Railroad Co., 20 Fed. 430.

<sup>446</sup> See ante, p. 351.

<sup>447</sup> See ante, p. 359. A stipulation exempting the carrier from liability for loss by fire while the property is in transit, or at places of transshipment, does not relieve the carrier from liability for loss occasioned by its negligent exposure, during a delay in transportation, to dangers that ordinary foresight should have guarded against, as where cotton on barges is anchored where sparks from passing steamers are apt to set it on fire. *Thomas v. Lancaster Mills*, 71 Fed. 481.

from destruction or injury by the elements; from the effects of delay; indeed, from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated.<sup>448</sup> Unknown causes, or those which are inherent in the nature of goods, and cannot be, in the exercise of diligence, averted, will not render the carrier liable. The nature of the goods must be considered, in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine, and heat, and must have cars fitted for their safe transportation.<sup>449</sup> Live animals must have food and water, when the dis-

<sup>448</sup> Hutch. Carr. § 320. Where goods become wet in transit, and would be injured if allowed to remain so, it is the carrier's duty to dry them. *Bird v. Cromwell*, 1 Mo. 81; *Chouteaux v. Leech*, 18 Pa. St. 224; *Notara v. Henderson*, L. R. 5 Q. B. 346, L. R. 7 Q. B. 225. It may be the duty of the carrier to apply water to hogs to prevent them from overheating. *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474; *Toledo, W. & W. Ry. Co. v. Thompson*, 71 Ill. 434; *Toledo, W. & W. Ry. Co. v. Hamilton*, 76 Ill. 393. See, further, as to duty of carrier with reference to live stock, *Kinnick v. Railroad Co.*, 69 Iowa, 665, 29 N. W. 772; *Bills v. Railroad Co.*, 84 N. Y. 5. See post, note 450. See, also, ante, pp. 370, 375. "In short, the conclusion to be drawn from these cases \* \* \* is that, whenever the situation or condition of the goods, from accident or from any cause, becomes such as to require a special care or attention, the carrier must put himself in the place of their owner and do for them all that might reasonably be expected of a prudent and careful person; and, if necessary, it would be his duty to incur any expense in their preservation which their value would justify, and which their condition might make necessary." Hutch. Carr. § 324. See, also, *The Niagara v. Cordes*, 21 How. 7; *American Exp. Co. v. Smith*, 33 Ohio St. 511. But a carrier is not bound to interrupt his voyage to preserve the goods. *The Lynx v. King*, 12 Mo. 272. But see *Notara v. Henderson*, L. R. 5 Q. B. 346, L. R. 7 Q. B. 225. Preference may be given to perishable goods. *Peet v. Railroad Co.*, 20 Wis. 594; *Tierney v. Railroad Co.*, 10 Hun, 569, 76 N. Y. 305; *Marshall v. Railroad Co.*, 45 Barb. 502, 48 N. Y. 660. But see *Great Western R. Co. v. Burns*, 60 Ill. 284. Or to preservation of life. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Pennsylvania R. Co. v. Fries*, 87 Pa. St. 234.

<sup>449</sup> Where butter shipped to New Orleans in warm weather is carried in a common car, without ice or other protection, the carrier is liable for its deterioration by heat. *Beard v. Railway Co.*, 79 Iowa, 518, 44 N. W. 800 (citing *Hewett v. Railroad Co.*, 63 Iowa, 611, 19 N. W. 790; *Sager v. Railroad Co.*, 31 Me. 228; *Hawkins v. Railroad Co.*, 17 Mich. 57, 18 Mich. 427; *Railroad Co. v. Pratt*, 22 Wall. 123; *Wing v. Railroad Co.*, 1 Hilt. 641; *Merchants'*



tance of transportation demands it.<sup>450</sup> Fruit, and some other perishable articles, must be carried with expedition, and protection

*Dispatch & Transportation Co. v. Cornforth*, 3 Colo. 280; *Boscowitz v. Express Co.*, 93 Ill. 523; *Steinweg v. Railroad Co.*, 43 N. Y. 123; *Alabama & V. R. Co. v. Searles*, 71 Miss. 744, 16 South. 255. "Having accepted the butter for transportation, defendant cannot escape liability for not safely transporting it on the ground that it did not have cars sufficient for the purpose." *Beard v. Railroad Co.*, *supra*. And see *Helliwell v. Railroad Co.*, 7 Fed. 68. Where a carrier allows ice in which poultry is packed to melt, without renewing it, he is liable if the poultry is spoiled by heat. *Peck v. Weeks*, 34 Conn. 145. See, also, *Sherman v. Steamship Co.*, 26 Hun, 107.

<sup>450</sup> *South & North Alabama R. Co. v. Henlein*, 52 Ala. 606. Cf. *Great Northern R. Co. v. Swaffield*, L. R. 9 Exch. 132. A carrier has the duty to feed and water stock during transportation, and cannot transfer it to the shipper by a custom requiring him to go along on the same train with the stock to feed and water them at his own risk and expense. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749. Where the shipper agrees to accompany live stock and attend to their wants, the carrier must allow him reasonable opportunity and facilities for so doing, or the carrier will be liable. *Smith v. Railroad Co.*, 100 Mich. 148, 58 N. W. 651; *Dawson v. Railroad Co.*, 76 Mo. 514; *Wabash, St. L. & P. Ry. Co. v. Pratt*, 15 Ill. App. 177; *Pt. Worth & D. C. R. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525; *Nashville, C. & St. L. Ry. Co. v. Heggie*, 86 Ga. 210, 12 S. E. 363; *Duvenick v. Railroad Co.*, 57 Mo. App. 550; *Taylor, B. & H. Ry. Co. v. Montgomery* (Tex. App.) 16 S. W. 178; *Gulf, C. & S. F. R. Co. v. Gann* (Tex. Civ. App.) 28 S. W. 349. "It is the duty of railway companies to provide suitable places for feeding and watering live stock transported over their lines; and if this is not done they are responsible for any loss entailed or that occurs from such neglect or failure. The carrier is primarily bound to provide feed and water for stock shipped over its line of railroad. [Citing *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474; *Toledo, W. & W. Ry. Co. v. Thompson*, 71 Ill. 434; *Dunn v. Railroad Co.*, 68 Mo. 268; *Harris v. Railroad Co.*, 20 N. Y. 232; *Cragin v. Railroad Co.*, 51 N. Y. 61.] In Missouri, it is held that a railroad company which transports live stock ought not only to have proper facilities and machinery for unloading the stock shipped over the company's line of road whenever, in the course of the transit, it may be necessary to unload them for exercise and refreshment, but also that it is the company's duty to unload, feed, and water them at their journey's end, as well as along the route, if there be delay in delivering them to the consignee, in order to discharge the carrier from liability, if the health or necessity of the animals require this to be done. *Dunn v. Railroad Co.*, 68 Mo. 268." *Gulf, C. & S. F. Ry. Co. v. Wilhelm* (Tex. App.) 16 S. W. 109. See, also, *Bryant v. Railroad Co.*, 68 Ga. 805. A car containing a horse should be set on a side track at the request of the

from frost.<sup>451</sup> So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight bills, or by other papers accompanying the shipment.”<sup>452</sup>

It is the duty of common carriers, during the transit, to use all the diligence and care towards the goods intrusted to them that prudent and cautious men in the like business usually employ for the safety and preservation of the property confided to their charge.<sup>453</sup> For this purpose they must have their stations and yards in a safe condition, so that those who use them by the carrier's invitation may do so without injury to themselves or the traffic they bring or remove.<sup>454</sup> They must provide proper cars and vehicles for the transportation, with all reasonable equipments and servants to take care of them.<sup>455</sup>

owner of the horse or his agent, when the persons in charge of the train are informed that the horse is frightened by the transportation, and is acting badly, and in danger of being killed or hurt, if it can reasonably be done. *Coupland v. Railroad Co.*, 61 Conn. 531, 23 Atl. 870. There is no obligation on a railroad company to lay out, for reloading, a car hired at a certain price for the trip, and partly filled with horses, because one of them has got down in the car, when the owner is with them, and, under the contract, is chargeable with their care, and can, if he chooses, abandon the contract altogether, or make a new one for a longer time. *Illinois Cent. R. Co. v. Peterson*, 68 Miss. 454, 10 South. 43.

<sup>451</sup> *Merchants' Dispatch & Transportation Co. v. Cornforth*, 3 Colo. 280; *Tucker v. Railroad Co.*, 11 Misc. Rep. 366, 32 N. Y. Supp. 1. Contra, where the shipper selects the vehicle. *Carr v. Schafer*, 15 Colo. 48, 24 Pac. 873.

<sup>452</sup> *Beard v. Railroad Co.*, 79 Iowa, 518, 44 N. W. 800. And see *Chicago & A. R. Co. v. Davis*, 54 Ill. App. 130.

<sup>453</sup> *Beal v. Railroad Co.*, 3 Hurl. & C. 337. The placing of a car, bedded with straw, containing valuable live stock, so near the engine that sparks could easily ignite the straw, constitutes negligence. *McFadden v. Railroad Co.*, 92 Mo. 343, 4 S. W. 689.

<sup>454</sup> *Rooth v. Railroad Co.*, 36 Law J. Exch. 83; *Mason v. Railroad Co.*, 25 Mo. App. 473; *Hutch. Carr.* § 516 et seq. And see post, p. 525. Carriers of live stock must furnish proper yards and other appliances to enable the stock to be received, loaded, unloaded, and delivered to the consignee. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461; *McCullough v. Railroad Co.*, 34 Mo. App. 23; *Cooke v. Railroad Co.*, 57 Mo. App. 471; *Missouri, K. & T. Ry. Co. v. Woods* (Tex. Civ. App.) 31 S. W. 237. A carrier cannot require extra compensation for such facilities. *Covington Stock-Yards Co. v. Keith*, supra.

<sup>455</sup> *Beckford v. Crutwell*, 5 Car. & P. 242. Where a railroad company negligently fails to provide a spark consumer, and goods are damaged by sparks

They must have their through communications so arranged as not to cause undue delay; their permanent way in such a state as not, by shaking, to make the chafing or wear and tear of the goods unduly severe. They must have proper tarpaulins and coverings to protect the goods from damage by exposure. They must provide cars or vehicles reasonably fit for the conveyance of the particular class of goods they undertake to carry.<sup>456</sup> And they will be liable for injury from the defects of a car, even if it belongs to another company, if they adopt it for the purposes of their own transit.<sup>457</sup> But it is sufficient if the company provide a carriage which, without extraordinary accident, will probably perform the journey.<sup>458</sup> In vehicles used for the transit of animals, the floor boards should be sound, and the fastenings to the doors sufficient to properly secure them.\* The company must take care not to forward in the same car goods which, from their proximity, would be likely to damage each other. Thus, they would be liable for injury to flour caused by the effluvium of spirits of turpentine,<sup>459</sup> or damage to cambric goods caused by sulphuric acid, if stowed near together.<sup>460</sup> If goods are of a class likely to be injured by coming in contact with other goods, the fact

from the engine, the carrier is liable, though by contract it was exempt from liability for loss by fire. *Steinweg v. Railroad Co.*, 43 N. Y. 123. See, also, *Empire Transportation Co. v. Wamsutta Oil Refining & Mining Co.*, 63 Pa. St. 14.

<sup>456</sup> *Shaw v. Railroad Co.*, 18 Law J. Q. B. 181, 13 Q. B. 347; *Root v. Railroad Co.*, 83 Hun, 111, 31 N. Y. Supp. 357. Where fires are burning along the track, it is negligence to carry cotton on open cars. *Insurance Co. of North America v. St. Louis, I. M. & S. R. Co.*, 3 McCrary, 233, 9 Fed. 811, 11 Fed. 380. Where a package is too large for a closed car, it is not negligence to carry it on an open car, provided reasonable diligence is used to protect it from the weather. *Burwell v. Railroad Co.*, 94 N. C. 451. Where the shipper, with full knowledge, selects the vehicle, the carrier is not liable for loss caused by its insufficiency. *Carr v. Schafer*, 15 Colo. 48, 24 Pac. 873.

<sup>457</sup> *Combe v. Railroad Co.*, 31 Law T. (N. S.) 613.

<sup>458</sup> *Amies v. Stevens*, 1 Strange, 128; *Blower v. Railroad Co.*, L. R. 7 C P. 655.

\* *Betts v. Railway Co. (Iowa)* 60 N. W. 623; *Union Pac. Ry. Co. v. Rainey*, 19 Colo. 225, 34 Pac. 986; *Selby v. Railroad Co.*, 113 N. C. 588, 18 S. E. 88; *Haynes v. Railroad Co.*, 54 Mo. App. 582.

<sup>459</sup> *The Colonel Ledyard*, 1 Spr. 530, Fed. Cas. No. 3,027.

<sup>460</sup> *Alston v. Harring*, 11 Exch. 822.

should be communicated to the company; otherwise, they will not be liable.<sup>461</sup>

The company must use the ordinary precautions to lessen as much as possible the ordinary wear and tear of goods; as, if a cask of brandy leak on the journey, they must take steps to stop the leak when it comes to their knowledge, otherwise they will be liable for the loss;<sup>462</sup> and though not liable for ordinary deterioration of goods, in quantity or quality, from inherent infirmity, yet if the goods require airing or ventilation during the journey, for the purposes of preservation, as fruits and such like articles sometimes do, they must do what is reasonably within their power for this purpose.<sup>463</sup>

The company must obey the directions of the owner of the goods during the transit; and a person who delivers goods to a railway company to carry, directed to a particular place, may countermand the direction at any moment of the transit, and demand back his goods,—at least, on payment of the carriage,—unless perhaps where the unpacking and delivering would be productive of much inconvenience.<sup>464</sup> So, also, the goods must be carried in the customary mode, or according to the directions of the shipper.<sup>465</sup> Where the

<sup>461</sup> *Hutchinson v. Guion*, 28 Law J. C. P. 63, 5 C. B. (N. S.) 149.

<sup>462</sup> *Beck v. Evans*, 16 East, 244. And see *Cox v. Railroad Co.*, 3 Fost. & F. 77. Where a carrier agreed that casks containing oil should be wetted twice a week, to prevent leakage, he is liable for leakage if he fails to do so, although the bill of lading exempts him from liability for leakage. *Hunnell v. Taber*, 2 Spr. 1, Fed. Cas. No. 6,880.

<sup>463</sup> *Davidson v. Gwynne*, 12 East, 381.

<sup>464</sup> *Scotthorn v. Railroad Co.*, 22 Law J. Exch. 121, 8 Exch. 341. "A carrier is employed as bailee of the person's goods, for the purpose of obeying his directions respecting them, and the owner is entitled to receive them back at any period of the journey when they can be got at. To say that a carrier is bound to deliver goods according to the owner's first directions is a proposition wholly unsupported either by law or common sense. I can well understand the case of goods being placed in such a position that they cannot be easily got at, though it is usually otherwise." Per Martin, B., in *Scotthorn v. Railroad Co.*, *supra*. The owner may stop the goods short of their destination, but the carrier will be entitled to full compensation. *Violett v. Stettinius*, 5 Cranch, C. C. 559, Fed. Cas. No. 16,953; *Thompson v. Small*, 1 C. B. 328. Where full charges are tendered, refusal to deliver freight at an intermediate point is a conversion. *Straus v. The Martha*, 35 Fed. 313.

<sup>465</sup> *Hutch. Carr.* § 310.

shipper directs how the goods shall be carried, acceptance by the carrier implies an agreement to carry in that manner; and, in the absence of any specific directions, the implied agreement is to carry in the usual manner. A disregard of the directions, or a carriage in other than the usual manner, renders the carrier liable as an insurer.<sup>466</sup> In the absence of express stipulation, the contract is to carry by the usual route; and, as has been seen, a deviation imposes absolute liability. But, where the carrier has an option as to routes, the option must be exercised in the shipper's interest. Where one route is dangerous, and the other safe, a choice of the dangerous route is negligence.

Of course, as in the case of ordinary bailees, the carrier is liable for anything amounting to an absolute breach of contract.

<sup>466</sup> Hutch. Carr. § 310; Express Co. v. Kountze, 8 Wall. 312; Maghee v. Railroad Co., 45 N. Y. 514; Dunseth v. Wade, 2 Seam. 285; Streeter v. Horlock, 1 Bing. 34; Sleat v. Fagg, 5 Barn. & Ald. 342. Shipping directions marked on the package must be obeyed. Hastings v. Pepper, 11 Pick. 41; The Star of Hope, 17 Wall. 651. But such directions are not binding when not called to the carrier's attention or inserted in the bill of lading. The New Orleans, 26 Fed. 44. Where goods are received, properly addressed, the carrier must forward them without further direction. O'Neill v. Railroad Co., 60 N. Y. 138; Rogers v. Wheeler, 52 N. Y. 262. By violation of his contracts, the carrier waives all exemptions from liability, whether created by law or special contract. Johnson v. Railroad Co., 33 N. Y. 610; Goodrich v. Thompson, 44 N. Y. 324; Goddard v. Mallory, 52 Barb. 87; Maghee v. Railroad Co., 45 N. Y. 514; Sleat v. Fagg, 5 Barn. & Ald. 342. Where goods were to be carried by "all rail," but were shipped on a steamer, and lost in a wreck of the vessel in a storm, the carrier is liable. Bostwick v. Railroad Co., 45 N. Y. 712. Where goods were to be carried by steam vessel, but the carrier sends them by sail, he is an insurer of safety, and if the goods are lost in a storm he is liable. Wilcox v. Parmelee, 3 Sandf. 610. Likewise, where the agreement is to carry goods "by sail on the lake," and they are sent by steam. Merrick v. Webster, 3 Mich. 268. Where a carrier violates his agreement to transport goods without change of cars, he waives the benefit of restrictions upon his liability contained in the contract of shipment. Stewart v. Transportation Co., 47 Iowa, 229.



## SAME—LIABILITY FOR DELAY.

86. In the absence of special contract, common carriers are bound only to use reasonable care and diligence in effecting the transportation without delay, in the usual course of business. There is not the same absolute liability for delay as there is for loss of, or injury to, the goods.

87. Where the carrier specially agrees to transport and deliver the goods within a prescribed time, he is absolutely liable for failure to do so.

When a carrier receives goods for transportation, the implied agreement is that they are to be carried and delivered within a reasonable time. But the carrier is not an insurer, in this regard, as he is in the case of loss or damage to the goods.<sup>467</sup> He is liable only in case he fails to exercise reasonable care and diligence to deliver the goods within a reasonable time. An unreasonable delay, however, does not amount to a conversion; and therefore the owner is bound to receive the goods, when tendered at the proper place, however long the delay.<sup>468</sup> The measure of damages in such a case is the loss proximately caused by the delay, not the value of the goods.<sup>469</sup>

*What is a Reasonable Time.*

What is a reasonable time within which to make delivery is a question of fact, to be determined with reference to all the circum-

<sup>467</sup> *Scovill v. Griffith*, 12 N. Y. 509; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Empire Transp. Co. v. Wallace*, 68 Pa. St. 302; *Kinnick v. Railroad Co.*, 69 Iowa, 665, 29 N. W. 772; *Savannah, F. & W. Ry. Co. v. Pritchard*, 77 Ga. 412, 1 S. E. 251; *Johnson v. Railway Co.*, 90 Ga. 810, 17 S. E. 121. But see *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458. Goods received on Sunday must be transported within a reasonable time. *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209.

<sup>468</sup> *Hutch. Carr.* § 328; *Scovill v. Griffith*, 12 N. Y. 509

<sup>469</sup> Such as deterioration of goods or loss of market. *Scovill v. Griffith*, 12 N. Y. 509; *Ruppel v. Railway Co.*, 167 Pa. St. 166, 31 Atl. 478; *Hudson v. Railroad Co.* (Iowa) 60 N. W. 608; *Fox v. Railroad Co.*, 148 Mass. 220, 19 N. E. 222; *Pereira v. Railroad Co.*, 66 Cal. 92, 4 Pac. 988; *Douglass v. Railroad Co.*, 53 Mo. App. 473; *Gulf, C. & S. F. R. Co. v. Hughes* (Tex. Civ. App.) 31

stances of the case, such as the distance the goods are to be carried, the mode of transportation, whether by land or water, steam, sail, or other motive power; the weather; the condition of the roads; the season of the year; and the like.<sup>470</sup>

*Excuses for Delay.*

A carrier is not liable for damages resulting from delay, where the delay occurred wholly without his fault or negligence.<sup>471</sup> Accident or misfortune, though not inevitable, nor caused by the act of God, will excuse delay.<sup>472</sup> Thus, though common carriers are liable absolutely for loss or damage caused by mobs or "strikers," as has been seen,<sup>473</sup> they are not liable for delay so caused.<sup>474</sup> So

S. W. 411; *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537; *Houseman v. Transportation Co.* (Mich.) 62 N. W. 290. The shipper may recover expenses to which he has been put by the delay. *Black v. Baxendale*, 1 Exch. 410; *Galveston, H. & S. A. Ry. Co. v. Tuckett* (Tex. Civ. App.) 25 S. W. 150; *Gulf, C. & S. F. Ry. Co. v. Hume*, 87 Tex. 211, 27 S. W. 110.

<sup>470</sup> *Coffin v. Railroad Co.*, 64 Barb. 379; *Wilbert v. Railroad Co.*, 12 N. Y. 245; *Nudd v. Wells*, 11 Wis. 407; *Parsons v. Hardy*, 14 Wend. 215; *Michigan Southern & N. I. R. Co. v. Day*, 20 Ill. 375; *Bennett v. Byram*, 38 Miss. 17; *East Tennessee & G. R. Co. v. Nelson*, 1 Cold. 272; *Gerhard v. Neese*, 36 Tex. 635; *McGraw v. Railroad Co.*, 18 W. Va. 361; *Peterson v. Case*, 21 Fed. 885; *St. Louis, I. M. & S. Ry. Co. v. Heath*, 41 Ark. 476; *Ormsby v. Railroad Co.*, 2 McCrary, 48, 4 Fed. 706; *St. Clair v. Railroad Co.*, 80 Iowa, 304, 45 N. W. 570. Where an unusual contingency has arisen, which, unexpectedly, largely increases the business, and thereby prevents the handling of freight with the usual promptness and dispatch, the criterion of reasonable diligence is not the usual average speed in ordinary times, but the average running time under the extraordinary and unusual circumstances existing at the time. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 5. For cases where delay has been held unreasonable, see *Missouri Pac. Ry. Co. v. Hall*, 14 C. C. A. 153, 66 Fed. 868; *Cartwright v. Railroad Co.*, 85 Hun, 517, 33 N. Y. Supp. 147; *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69, 28 S. W. 965.

<sup>471</sup> *Ruppel v. Railway Co.*, 167 Pa. St. 166, 31 Atl. 478; *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209; *Taylor v. Railroad Co.*, L. R. 1 C. P. 385. A carrier is liable for negligent delay. *Rawson v. Holland*, 59 N. Y. 611; *Michigan Southern & N. I. R. Co. v. Day*, 20 Ill. 375; *Rathbone v. Neal*, 4 La. Ann. 563.

<sup>472</sup> *Hutch. Carr.* § 330.

<sup>473</sup> See ante, p. 364.

<sup>474</sup> *Pittsburgh, C. & St. L. R. Co. v. Hollowell*, 65 Ind. 188. But see *Blackstock v. Railroad Co.*, 20 N. Y. 48. Where the employes of a railroad company

collision on land<sup>475</sup> or water<sup>476</sup> will excuse delay, as will also a heavy snow,<sup>477</sup> the freezing of navigable waters,<sup>478</sup> the low stage of a river,<sup>479</sup> an unusual press of freight,<sup>480</sup> and the like.<sup>481</sup> Under some circumstances, delay may even be a duty, as where the safety of the goods demands it. The safety of the goods is of more importance than a speedy delivery. So where the usual route of a vessel was through Long Island Sound, but, owing to the passage being obstructed by ice, the master went around by the open sea, where the goods were lost in a storm, the owners were held liable on the ground that the master should have waited until the safer route was open.<sup>482</sup>

suddenly refuse to work, and are discharged, and delay results from the failure of the company to promptly supply their places, the company is liable for any damage caused by such delay; but, where the places of the striking employés are promptly supplied by other competent men, and the strikers then prevent the new employés from doing duty by lawless and irresistible violence, the company is not liable for delay caused solely by such lawless violence. *Pittsburgh R. Co. v. Hazen*, 84 Ill. 36; *Pittsburgh, C. & St. L. R. Co. v. Hollowell*, *supra*; *Greismer v. Railroad Co.*, 102 N. Y. 563, 7 N. E. 828; *Gulf, C. & S. F. Ry. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191; *Haas v. Railroad Co.*, 81 Ga. 792, 7 S. E. 628; *International & G. N. R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. 900; *Lake Shore & M. S. Ry. Co. v. Bennett*, 89 Ind. 457; *Missouri Pac. R. Co. v. Levi* (Tex. App.) 14 S. W. 1062; *Southern Pac. R. Co. v. Johnson* (Tex. App.) 15 S. W. 121; *Bartlett v. Railroad Co.*, 94 Ind. 281. But cf. *Read v. Railroad Co.*, 60 Mo. 199.

<sup>475</sup> *Conger v. Railroad Co.*, 6 Duer. 375.

<sup>476</sup> *Parsons v. Hardy*, 14 Wend. 215.

<sup>477</sup> *Pruitt v. Railroad Co.*, 62 Mo. 527; *Ballentine v. Railroad Co.*, 40 Mo. 491; *Briddon v. Railroad Co.*, 28 L. J. Exch. 51.

<sup>478</sup> *Bowman v. Teall*, 23 Wend. 306; *Beckwith v. Frisby*, 32 Vt. 559. But see *Spann v. Transportation Co.*, 11 Misc. Rep. 680, 32 N. Y. Supp. 566.

<sup>479</sup> *Bennett v. Byram*, 38 Miss. 17; *Silver v. Hale*, 2 Mo. App. 557.

<sup>480</sup> *Wibert v. Railroad Co.*, 12 N. Y. 245; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6. But see *Thomas v. Railway Co.*, 63 Fed. 200; *International & G. N. R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 21 S. W. 691; *Louisville & N. R. Co. v. Touart*, 97 Ala. 514, 11 South. 756.

<sup>481</sup> See, generally, *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Liv- ington v. Railroad Co.*, 5 Hun, 562; *Taylor v. Railroad Co.*, L. R. 1 C. P. 385. A carrier need not incur heavy expense, or use extraordinary exertions, to hasten the transportation of goods. Reasonable diligence is all that is required. *Empire Transportation Co. v. Wallace*, 68 Pa. St. 302.

<sup>482</sup> *Crosby v. Fitch*, 12 Conn. 410.

During the time of necessary delay, the carrier must use ordinary care and diligence to preserve the goods.<sup>483</sup> When the cause of delay is removed, he must promptly complete the carriage.<sup>484</sup> Unavoidable delay does not discharge the contract of carriage.<sup>485</sup>

*Delivery Within Stipulated Time.*

Where a carrier agrees to transport and deliver goods within a stipulated time, he is absolutely liable if he fails to do so. He is not excused by circumstances beyond his control, such as the act of God or inevitable accident. This is on the ground that the carrier has insured such delivery, by failing to provide against any cause of delay in his contract.<sup>486</sup> Thus, an extraordinary freshet, rendering a canal impassable, will not excuse delivery within a stipulated time;<sup>487</sup> and it is no defense to an action on a charter party, for not sailing on the voyage towards a port agreed upon, that the port was in a state of blockade, if the defendant knew that fact at the time of entering into the charter party.<sup>488</sup>

<sup>483</sup> Bowman v. Teall, 23 Wend. 306; Bennett v. Pyram, 38 Miss. 17.

<sup>484</sup> Hadley v. Clarke, 8 Term R. 259; Palmer v. Lorillard, 16 Johns. 312.

<sup>485</sup> Id.; Hutch. Carr. § 335. And see St. Louis, I. M. & S. Ry. Co. v. Jones (Tex. Civ. App.) 29 S. W. 695.

<sup>486</sup> Fox v. Railroad Co., 148 Mass. 220, 19 N. E. 222; Pereira v. Railroad Co., 66 Cal. 92, 4 Pac. 988; Chicago & A. R. Co. v. Thrapp, 5 Ill. App. 502; Deming v. Railroad Co., 48 N. H. 455; Place v. Express Co., 2 Hilt. 19; Harrison v. Railroad Co., 74 Mo. 364; Parmelee v. Wilks, 22 Barb. 539; Harmony v. Bingham, 12 N. Y. 99; Cantwell v. Express Co., 58 Ark. 487, 25 S. W. 503. Cf. Atchison, T. & S. F. Ry. Co. v. Bryan (Tex. Civ. App.) 28 S. W. 98; International & G. N. Ry. Co. v. Wentworth, 87 Tex. 311, 28 S. W. 277. So, where a vendor of goods agrees absolutely to deliver them by a certain time, impossibility of obtaining them will not excuse him. Gilpin v. Consequa, Pet. C. C. 85, Fed. Cas. No. 5,452; Youqua v. Nixon, Pet. C. C. 221, Fed. Cas. No. 18,189. Nor impossibility of delivering them. Bryan v. Spurgin, 5 Sneed, 681. The contract may be implied from acceptance of the goods with knowledge that they are intended to be at their destination on a given day. Chicago, etc., R. Co. v. Thrapp, 5 Ill. App. 502; Grindle v. Express Co., 67 Me. 317; Philadelphia, W. & B. R. Co. v. Lehman, 56 Md. 209. But see United States Exp. Co. v. Root, 47 Mich. 231, 10 N. W. 351.

<sup>487</sup> Harmony v. Bingham, 12 N. Y. 99, 1 Duer, 209. And see comment on this case in Hutch. Carr. p. 374, note 1.

<sup>488</sup> Medeiros v. Hill, 8 Bing. 231. See, also, Atkinson v. Ritchie, 10 East, 530.

There is an implied condition, in contracts of this kind, that the shipper shall not himself be in default in furnishing the goods for shipment at the time agreed upon. If the shipper is in default, the carrier is excused for failure to deliver within the stipulated time.<sup>489</sup>

#### SAME—SPECIAL PROPERTY OF CARRIER—RIGHT OF ACTION.

**88. Common carriers have a special property in the goods shipped, and may maintain an action for any wrongful interference with their possession.**

Like other bailees for hire, common carriers have a special property in the goods shipped. They may maintain any appropriate action to preserve their own or the owner's interest. In suing for damages for conversion of or injury to the property, the carrier may recover the entire damage, as against a person without right or title,—being accountable over to the owner; but as against the owner, or any person claiming under him, the carrier can recover only his own interest in the property. The rules applicable to bailments in general are equally applicable here.<sup>490</sup> If the carrier pay the owner the value of property lost or injured by the wrongful act of a third person, he will be subrogated to all the rights of the owner against such wrongdoer, and may recover full damages for his own benefit.<sup>491</sup> The carrier also has an insurable interest in the property shipped, and may insure them to their full value, not only for his own benefit, but also for the benefit of the shipper; and, even as against perils for which he is not liable, he may insure for the benefit of the owner.<sup>492</sup> The owner may, of course, insure the goods

<sup>489</sup> Hutch. Carr. § 319a; *Fowler v. Steam Co.*, 87 N. Y. 190.

<sup>490</sup> *The Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. 860; *Ingersoll v. Van Bokkellin*, 7 Cow. 670; *Little v. Fossett*, 34 Me. 545; *Hayes v. Riddle*, 1 Sandf. 248.

<sup>491</sup> *Hagerstown Bank v. Adams Exp. Co.*, 45 Pa. St. 419; Hutch. Carr. § 427.

<sup>492</sup> *British & Foreign Marine Ins. Co. v. Gulf, C. & S. F. Ry. Co.*, 63 Tex. 475; *Savage v. Insurance Co.*, 36 N. Y. 655; *Van Natta v. Insurance Co.*, 2 Sandf. 490; *Eastern R. Co. v. Relief Ins. Co.*, 98 Mass. 420; *Com. v. Hide & Leather Ins. Co.*, 112 Mass. 136. Where a carrier insures goods for full value, he is trustee of the owner for the excess over his own interest. *Stillwell v. Staples*, 19 N. Y. 401; *Waters v. Assurance Co.*, 5 El. & Bl. 870.



for his own benefit; and in case of loss the carrier will not be subrogated to the rights of the owner against the insurance company, and cannot hold the latter for contribution, for the reason that the carrier is primarily liable.<sup>492</sup> Neither can the carrier require, as a condition precedent for receiving the goods, that the owner insure them for the carrier's benefit. If the contract of carriage "contained a provision that the carrier would not be liable unless the owner should insure for its benefit, such provision could not be sustained, for that would be to allow the carrier to decline the discharge of its duties and obligations as such, unless furnished with indemnity against the consequences of failure in such discharge. Refusal of the owners to enter into a contract so worded would furnish no defense to an action to compel the company to carry, and submission to such a requisition would be presumed to be the result of duress of circumstances, and not binding."<sup>494</sup>

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#### SAME—SPECIAL CONTRACT.

89. The rights and liabilities of common carriers are affected by the special contract of carriage. This will be considered under the following heads:

- (a) Contracts limiting liability (p. 413).
- (b) Notices limiting liability (p. 437).

90. **CONTRACTS LIMITING LIABILITY**—By express agreement, common carriers may limit their liability to that of ordinary bailees for hire; but they cannot stipulate against liability for negligence, either of themselves or of their agents or servants (p. 414), except:

**EXCEPTIONS**—(a) In Illinois the carrier may stipulate against the ordinary, but not the gross, negligence of his servants (p. 421).

<sup>492</sup> *Gales v. Hailman*, 11 Pa. St. 515. By contract, the carrier may have the benefit of insurance effected by the shipper. *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173; *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 2 N. E. 103; *British & Foreign Marine Ins. Co. v. Gulf, C. & S. F. R. Co.*, 63 Tex. 475; *Rintoul v. Railroad Co.*, 17 Fed. 905; *Hardman v. Brett*, 37 Fed. 803.

<sup>494</sup> *Inman v. Railway Co.*, 129 U. S. 128, 9 Sup. Ct. 249, per Fuller, C. J.

- (b) In New York the carrier may stipulate against liability for negligence of his servants, but not for his personal negligence (p. 421).
- (c) In a few states contracts limiting liability are prohibited by statute (p. 424).
- (d) In most states contracts limiting liability to an amount less than the value of the property are valid (p. 425).

91. Contracts regulating the time and manner of presenting claims for damages are valid, provided they are reasonable (p. 429).

*Limiting Liability for Loss or Damage.*

Common carriers had no power originally, at common law, to limit their extraordinary liability, it being regarded as against public policy to permit them to do so.<sup>495</sup> Subsequently, however, the rule was relaxed, and it was well established in England by the beginning of the present century that common carriers might limit their liabilities, either by general notice<sup>496</sup> or by special contract,<sup>497</sup> even to the extent of exempting themselves against liability for their own negligence.<sup>498</sup> Subsequently the original common-law rule was, in a measure, restored, by the railway and canal traffic act,<sup>499</sup> which provided that no contract limiting the liability of common carriers should be valid, unless, in the opinion of the court or judge before whom the question arose, it was "just and reasonable."

<sup>495</sup> Lawson, Cont. Carr. § 24. The Doctor and Student, Dialogue 2, c. 28; Noys, Maxims, 92; Hide v. Proprietors (1793) 1 Esp. 36; Kerr v. Willan (1817) Holt, 645.

<sup>496</sup> Leeson v. Holt (1816) 1 Starkie, 186; Maving v. Todd, Id. 72; Nicholson v. Willan, 5 East, 507.

<sup>497</sup> Anonymous v. Jackson, Peake, 185; Izett v. Mountain, 4 East, 371; Nicholson v. Willan, 5 East, 507; Clarke v. Gray, 6 East, 564; Harris v. Packwood, 3 Taunt. 264; Beck v. Evans, 16 East, 244; Munn v. Baker, 2 Starkie, 255; Wyld v. Plckford, 8 Mees. & W. 443; Carr v. Railway Co., 7 Exch. 707.

<sup>498</sup> Maving v. Todd, 1 Starkie, 72; Leeson v. Holt, Id. 186; Carr v. Railway Co., 7 Exch. 707. See, also, remarks by Shipman, J., in The Majestic, 9 C. C. A. 161, 60 Fed. 624.

<sup>499</sup> 17 & 18 Vict., c. 31, 1854. This act was not passed until the judges had

In the United States the original common-law rule was never so far departed from as it was in England, and it is almost universally held in this country that the carrier may contract against his liability as an insurer, but not against liability for damages caused by his own or his servants' negligence.<sup>500</sup> The extraor-

many times expressed regret that the original common-law rule had been abandoned. See *Beck v. Evans*, 16 East, 244, 247, per Le Blanc, J.; *Harris v. Packwood*, 3 Taunt. 264, 271, per Mansfield, C. J.; *Brooke v. Pickwick*, 4 Bing. 218, 221, per Best, C. J.; *Down v. Fromont*, 4 Camp. 40, 41, per Lord Ellenborough. See, also, *Maving v. Todd*, 1 Starkie, 72, 74; *Kerr v. Willan*, Holt, 645; *Smith v. Horne*, Id. 643.

<sup>500</sup> *South & N. A. R. Co. v. Henlein*, 52 Ala. 606, 56 Ala. 368; *East Tennessee, V. & G. R. Co. v. Johnston*, 75 Ala. 596; *Little Rock, M. R. & T. Ry. Co. v. Talbot*, 47 Ark. 97, 14 S. W. 471; *Taylor v. Railroad Co.*, 39 Ark. 148; *Overland Mail & Exp. Co. v. Carroll*, 7 Colo. 43, 1 Pac. 682; *Merchants' Dispatch & Transportation Co. v. Cornforth*, 3 Colo. 280; *Union Pac. R. Co. v. Rainey*, 19 Colo. 225, 34 Pac. 986; *Camp v. Steamboat Co.*, 43 Conn. 333; *Welch v. Railroad Co.*, 41 Conn. 333; *Central R. Co. v. Bryant*, 73 Ga. 722, 726; *Berry v. Cooper*, 28 Ga. 543; *Flinn v. Railroad Co.*, 1 Houst. 469, 502; *Boscowitz v. Express Co.*, 93 Ill. 523; *Erie Ry. Co. v. Wilcox*, 84 Ill. 239; *Rosenfeld v. Railway Co.*, 103 Ind. 121, 2 N. E. 344; *Bartlett v. Railway Co.*, 94 Ind. 281; *Ohio & M. Ry. Co. v. Selby*, 47 Ind. 471; *Sprague v. Railway Co.*, 34 Kan. 347, 8 Pac. 465; *St. Louis, K. C. & N. Ry. Co. v. Piper*, 13 Kan. 505; *Louisville & N. R. Co. v. Brownlee*, 14 Bush (Ky.) 590; *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush (Ky.) 645; *New Orleans Mut. Ins. Co. v. New Orleans, J. & G. N. R. Co.*, 20 La. Ann. 302; *Roberts v. Riley*, 15 La. Ann. 103; *Little v. Railroad*, 66 Me. 239; *Willis v. Railway Co.*, 62 Me. 488; *McCoy v. Transportation Co.*, 42 Md. 498; *Brehme v. Express Co.*, 25 Md. 328; *Hoadley v. Transportation Co.*, 115 Mass. 304; *Pemberton Co. v. New York Cent. R. Co.*, 104 Mass. 144, 151; *School District in Medfield v. Boston, H. & E. R. Co.*, 102 Mass. 552; *Grace v. Adams*, 100 Mass. 505; *Squire v. Railroad Co.*, 98 Mass. 239; *Feige v. Railroad Co.*, 62 Mich. 1, 28 N. W. 685; *Michigan Cent. R. Co. v. Ward*, 2 Mich. 538, overruled in *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243; *Boehl v. Railway Co.*, 44 Minn. 191, 46 N. W. 333; *Hull v. Railway Co.*, 41 Minn. 510, 43 N. W. 391; *Orut v. Railway Co.*, 36 Minn. 396, 31 N. W. 519; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 1003, 1011; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017; *New Orleans, St. L. & C. R. Co. v. Faler*, 58 Miss. 911; *McFadden v. Railway Co.*, 92 Mo. 343, 4 S. W. 689; *Ball v. Railway Co.*, 83 Mo. 574; *Craycroft v. Railroad Co.*, 18 Mo. App. 437; *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117, 121; *Chicago, I. & P. R. Co. v. Witty*, 32 Neb. 275, 49 N. W. 183; *Rand v. Transportation Co.*, 59 N. H. 363; *Moses v. Railroad Co.*, 24 N. H. 71, 32 N. H. 523; *Ashmore v. Transportation Co.*, 28 N. J. Law, 180; *Phifer*

inary liability of common carriers was originally imposed by public policy, because of the danger of collusion between the carrier and robbers.<sup>501</sup> The improved state of society, the better administration of the laws, and the rapidity and comparative safety of modern modes of transportation, in the course of time, rendered less imperative the strict application of the rule that the carrier must be responsible at all events.<sup>502</sup> Hence a contract exempting a carrier from liability as an insurer came to be thought a just and reasonable one, and no longer against public policy. But the uneven terms upon which the parties deal, often enabling the carrier to practically dictate his own terms, still makes it a matter of public policy that some limitation be put upon their power to contract in this regard. The American courts have been almost unanimous in denying to common carriers the right to contract against liability for negligence, either of themselves or their agents or employés. The able opinion of Mr. Justice Bradley in

*v. Railway Co.*, 89 N. C. 311; *Smith v. Railroad Co.*, 64 N. C. 235; *Gaines v. Insurance Co.*, 28 Ohio St. 418; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *Armstrong v. Express Co.*, 159 Pa. St. 640, 28 Atl. 448; *Merchants' Dispatch Transp. Co. v. Block*, 86 Tenn. 392, 397, 6 S. W. 881; *Coward v. Railroad Co.*, 16 Lea, 225; *Gulf, C. & S. F. Ry. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567 (under statute); *Gulf, C. & S. F. Ry. Co. v. McGown*, 65 Tex. 640; *Houston & T. O. R. Co. v. Burke*, 55 Tex. 323; *Mann v. Birchard*, 40 Vt. 326; *Blumenthal v. Brainerd*, 38 Vt. 402; *Virginia & T. R. Co. v. Sayers*, 26 Grat. 328; *Wilson v. Railroad Co.*, 21 Grat. 654, 671; *Brown v. Express Co.*, 15 W. Va. 812; *Maslin v. Railroad Co.*, 14 W. Va. 180; *Abrams v. Railway Co.*, 87 Wis. 485, 58 N. W. 780. And see *Black v. Transportation Co.*, 55 Wis. 319, 13 N. W. 244; *Thomas v. Railway Co.*, 63 Fed. 200; *Hudson v. Railroad Co. (Iowa)* 60 N. W. 608; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, 328; *Railroad Co. v. Pratt*, 22 Wall. 123; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469; *Thomas v. Lancaster Mills*, 71 Fed. 481. A stipulation in a bill of lading, providing that the shipper shall insure the goods, and that, in case of loss, the carrier shall have the benefit of the insurance, if such loss "shall occur from any cause which shall be held to render this line or its agents liable therefor," is a contract intended to protect the carrier against the consequences of his own negligence, and is void. *Willock v. Railroad Co.*, 166 Pa. St. 184, 30 Atl. 948. See ante, p. 412.

<sup>501</sup> *Lawson*, Bailm. § 138. See ante, p. 352.

<sup>502</sup> *Hutch. Carr.* § 226.

*Railroad Co. v. Lockwood*,<sup>503</sup> leaves little to be said on the subject. "It is contended," said the learned justice, "that, though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties,—an object essential to the welfare of every civilized community. Hence the common-law rule, which charged the common carrier as an insurer. Why charge him as such? Plainly, for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment; and to assert that he may do so seems almost a contradiction in terms. Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service, which the law demands; not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law. It is a favorite argument, in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agree-

<sup>503</sup> 17 Wall. 357.



ments, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in *Dorr v. New Jersey Steam-Navigation Company*,<sup>504</sup> the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right." Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers, in effect, by introducing new rules of obligation. The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle, or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough: If they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of \$14 for every animal carried, instead of the usual charge of \$70 for a car load; being a difference of three to one. Of course, no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those

<sup>504</sup> 4 Sandf. 136.

principles of law by which the public interests are protected. If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And, when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of

any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society, and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law. Hence, as before remarked, we regard the English statute called the 'Railway and Canal Traffic Act,' passed in 1854, which declared void all notices and conditions made by common carriers, except such as the judge at the trial, or the courts, should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law, instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect, when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into without regard to the character of the contract and the relative situation of the parties. Conceding, therefore, that special contracts made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable (to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part), when they ask to go still further, and to be excused for negligence (an excuse so repugnant to the law of their foundation, and to the public good), they have no longer any plea of justice or reason to support such a stipulation, but the contrary.

And then the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity."

*Same—Exceptions—Rule in Illinois.*

In Illinois it has been held that common carriers may contract for exemption from liability for ordinary negligence on the part of their servants, but not for gross or willful negligence,<sup>505</sup> and the same doctrine has been recognized in other cases.<sup>506</sup> But it has already been seen that it is extremely doubtful whether the distinction as to the different degrees of negligence can be sustained.<sup>507</sup>

*Same—Rule in New York.*

In New York a distinction is recognized between the carrier's personal negligence and the negligence of his servants and agents; he being permitted to contract against the latter,<sup>508</sup> but not the former.<sup>509</sup> The distinction is recognized even in the case of cor-

<sup>505</sup> *Arnold v. Railroad Co.*, 83 Ill. 273; *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 136; *Illinois Cent. R. Co. v. Read*, 37 Ill. 484; *Erle R. Co. v. Wilcox*, 84 Ill. 239; *Wabash Ry. Co. v. Brown*, 152 Ill. 484, 39 N. E. 273; *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Illinois Cent. R. Co. v. Adams*, 11 Ill. 474; *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 354. Compare *Adams Exp. Co. v. Stettinners*, 61 Ill. 184; *Boskowitz v. Express Co. (Ill.)* 5 Cent. Law J. 58.

<sup>506</sup> *Meuer v. Railroad Co. (S. D.)* 59 N. W. 945; *Alabama & G. R. Co. v. Thomas*, 83 Ala. 343, 3 South. 802. The Indiana and Alabama courts, however, now follow the ordinary rule. See ante, note 500.

<sup>507</sup> See ante, p. 24.

<sup>508</sup> *Wilson v. Railroad Co.*, 97 N. Y. 87; *Bissell v. Railroad Co.*, 25 N. Y. 442; *Perkins v. Railroad Co.*, 24 N. Y. 196; *Wells v. Railroad Co.*, Id. 181; *Smith v. Railroad Co.*, Id. 222. The decisions in New York have not been uniform. See *Wells v. Navigation Co.*, 8 N. Y. 375; *Magnin v. Dinsmore*, 70 N. Y. 410; *Alexander v. Greene*, 7 Hill, 533; *Dorr v. Navigation Co.*, 11 N. Y. 485; *Cole v. Goodwin*, 19 Wend. 251; *Mynard v. Railroad Co.*, 71 N. Y. 180. It was first held that common carriers could not limit their liability by contract. *Gould v. Hill*, 2 Hill. 623; *Alexander v. Greene*, 3 Hill. 9. But these cases were soon overruled. See *Parsons v. Monteath*, 13 Barb. 353; *Moore v. Evans*, 14 Barb. 524. A mere notice was never deemed sufficient. *Hollister v. Nowlen*, 19 Wend. 234.

<sup>509</sup> *Smith v. Railroad Co.*, 24 N. Y. 222. Contra *Cragin v. Railroad Co.*, 51 N. Y. 61. See, also, *Hawkins v. Railroad Co.*, 17 Mich. 57; *Indianapolis etc., R. Co. v. Strain*, 81 Ill. 504; *Welsh v. Railroad Co.* 10 Ohio St. 35.

porations. "The carrier may, and generally does, act by agents, and, in the case of a corporation, always must do so. But nevertheless there is such a thing as negligence imputable to the carrier, whether a corporation or not, as distinguished from the negligence of its agents. For example, a railroad company is bound to provide a roadbed, rails, ties, engines, cars, and appliances of all kinds, of the best character and description that can reasonably be procured, and that are by other railroad companies recognized as desirable and proper to be used. It is not bound to try experiments, but it is bound to keep up with the progress of invention, as tested by experience; and, if its agents fail to fulfill the duty thus devolved upon the carrier, the breach of this duty is treated as the carrier's personal negligence."<sup>510</sup>

The argument for the New York rule is well stated by Woodruff, J., in *French v. Buffalo, etc., R. Co.*:<sup>511</sup> "A party may certainly consent to place the instruments and agencies which he is employing in his business at the service, *pro hac vice*, of another, undertaking to set them in motion under the scheme or plan of management which he has established, and say: 'You shall have the benefit of my enterprise, my machinery, my servants, my rules, my regulations and scheme of administration; but I propose that you shall take the hazards of everything but my own fraud or gross negligence, and regard me in no respect insuring or guaranteeing the fidelity or the prudence, diligence, or care of those servants, whom I have no reason to distrust, but who may, out of my personal presence, neglect their duty, or prove otherwise unfaithful.' There is no sound reason for denying that if a contract is made on those terms, and presumptively for a much less compensation to be paid, it shall not bind the parties. It may safely be assumed that—in this country, at least—men of business are shrewd enough to take care of their own interests, and that, if a party consents to such a bargain, it is because it is for his interest to do so. He expects to make or save money by relieving the other party from risks which he is willing to assume, and in general his expectation is realized. There is neither honesty nor policy in permitting him, when a loss happens through one of the

<sup>510</sup> Wheeler, *Mod. Carr.* 77.

<sup>511</sup> \*43 N. Y. 108.



risks he consented to bear, to deny the binding force of his contract. This is now the practical view of the subject, which is recognized as law."<sup>512</sup>

The distinction is unsound. "In the nature of things, every corporation must act solely through its agents; and that their powers and duties may differ in degree, it seems to us, should make no difference, in so far as duties and liabilities to passengers, whether free or paying full fare, are concerned. The true inquiry, at last, is, did the injury result from the negligence of any agent of the

<sup>512</sup> In a dissenting opinion, delivered in *Smith v. Railroad Co.*, 24 N. Y. 222, Wright, J., said: "Whether a contract shall be avoided on the ground of public policy does not depend upon the question whether it is beneficial or otherwise to the contracting parties. Their personal interests have nothing to do with it, but the interests of the public are alone to be considered. The state is interested not only in the welfare but in the safety of its citizens. To promote these ends is a leading object of government. Parties are left to make whatever contracts they please, provided no legal or moral obligation is thereby violated, or any public interest impaired; but when any effect or tendency of the contract is to impair such interest, it is contrary to public policy, and void. Contracts in restraint of trade are void, because they interfere with the welfare and convenience of the state; yet the state has a deeper interest in protecting the lives of its citizens. It has manifested this interest unmistakably in respect to those who travel by railroads. Whether a carrier, to whose exclusive charge the safety of a passenger has been committed, by his own culpable negligence and misconduct, shall put in jeopardy the life of such passenger, is a question affecting the public, and not the party alone who is being carried. It is said that the passenger should be left to make whatever contract he pleases; but, in my judgment, the public having an interest in his safety, he has no right to absolve a railroad company, to whom he commits his person, from the discharge of those duties which the law has enjoined upon it in regard for the safety of men. Can a contract, then, which allows the carrier to omit all caution or vigilance, and is, in effect, a license to be culpably negligent, to the extent of endangering the safety of the passenger, be sustained? I think not. Such a contract, it seems to me, manifestly conflicts with the settled policy of the state in regard to rail and carriage. Its effect, if sustained, would obviously enable the carrier to avoid the duties which the law enjoins in regard to the safety of men encourage negligence and fraud, and take away the motive of self-interest on the part of such carrier, which is, perhaps, the only one adequate to secure the highest degree of caution and vigilance. A contract with these tendencies is, I think, contrary to public policy, even when no fare is paid." See, also, able dissenting opinion of Sutherland, J., in *Wells v. Railroad Co.*, 24 N. Y. 181, 186.

corporation while acting within the scope of his employment? If a corporation may relieve itself from liability to a passenger for the negligence of one or more classes of agents, why may it not for the negligence of another class? All of a corporation's employés, from the highest official to the humblest laborer, are but agents. Some of them are necessarily clothed with extensive powers to make contracts which will bind the corporation in reference to many matters, and to control its operations, while others have but simple labors to perform; yet none of them are the corporation, clothed with its full power, or responsible for all its acts."<sup>513</sup>

Equally unsound is the distinction in the case of individuals. It is the carrier's general duty to carry safely. He may perform this duty by himself, or by his agents. The public policy which will not permit him to escape liability for his own negligence in the performance of his duty would equally forbid exemption from liability for the negligence of one to whom he had intrusted the performance of such duty.<sup>514</sup> In either case the master is liable, because the master's duty is violated; and it is immaterial whether the violation be by the master himself, or by his agents acting in the course of his employment. Were the rule otherwise, any one who intrusts the management of his business to agents or servants might escape all liability for negligence in its performance, and corporations which can act only through agents could never be made liable for negligence. In Iowa, and some other states, common carriers are prohibited by statute from limiting their common-law liability.<sup>515</sup>

<sup>513</sup> *Gulf, C. & S. F. Ry. Co. v. McGowan*, 65 Tex. 640.

<sup>514</sup> "A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment. Nor can those duties be waived in respect to his agents or servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants. The law demands of the carrier carefulness and diligence in performing the service, not merely an abstract carefulness and diligence in proprietors and stockholders, who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law." *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469.

<sup>515</sup> *McClain's Code Iowa*, §§ 2007, 3371. See *Houston & T. O. R. Co. v. Burke*, 55 Tex. 323; *Mather v. Express Co.*, 9 Biss. 293, 2 Fed. 49; *Gulf, C.*

*Same—Limiting Amount of Liability.*

There is much confusion and conflict in the decisions on the question as to whether a common carrier can limit his liability to an amount less than the value of the property, as against a loss through negligence. May common carriers arbitrarily, or by contract, place a value upon articles received for carriage, and in this way seek to limit the amount of recovery against them in case of loss? It is obvious that, as they may contract against all liability in cases of loss without their fault, they may contract for the amount of recovery in such cases. But in case of a loss through negligence the same reasons, at first view, would seem to exist against contracts limiting the amount of recovery as exist against contracts for total exemption. And hence some courts have held such contracts void.<sup>516</sup> The argument in favor of this view runs thus: "The carrier cannot, by contract, excuse itself

& S. F. R. Co. v. Booton (Tex. App.) 15 S. W. 909; Missouri Pac. R. Co. v. Vandeventer, 26 Neb. 222, 41 N. W. 998.

<sup>516</sup> Oppenheimer v. Express Co., 69 Ill. 62; Adams Exp. Co. v. Stettaners, 61 Ill. 184; Alabama G. S. R. Co. v. Little, 71 Ala. 611; South & North A. R. Co. v. Henlein, 52 Ala. 606; Mobile & O. R. Co. v. Hopkins, 41 Ala. 486; Adams Exp. Co. v. Harris, 120 Ind. 73, 21 N. E. 340; Chicago. St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017; Southern Exp. Co. v. Moen, 39 Miss. 822; Coward v. Railroad Co., 16 Lea (Tenn.) 225; Georgia Railroad & Banking Co. v. Keener, 93 Ga. 808, 21 S. E. 287; Ruppel v. Railroad Co., 167 Pa. St. 166, 31 Atl. 478; Wabash R. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Kansas City, St. J. & C. B. R. Co. v. Simpson, 30 Kan. 645, 2 Pac. 821; United States Exp. Co. v. Backman, 28 Ohio St. 144; Black v. Transportation Co., 55 Wis. 319, 13 N. W. 244; Moulton v. Railway Co., 31 Minn. 85, 16 N. W. 497; Louisville & N. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Grogan v. Adams Exp. Co., 114 Pa. St. 523, 7 Atl. 134; Weiller v. Railroad Co., 134 Pa. St. 310, 19 Atl. 702; Adams Exp. Co. v. Holmes (Pa. Sup.) 9 Atl. 166; American Exp. Co. v. Sands, 55 Pa. St. 140; Westcott v. Fargo, 61 N. Y. 512; Southern Pac. R. Co. v. Maddox, 75 Tex. 300, 12 S. W. 815. See Savannah F. & W. R. Co. v. Aloat, 20 S. E. 219, 93 Ga. 803. James, J., in an unreported case in the supreme court of the District of Columbia, quoted in Kansas City, St. J. & C. B. R. Co. v. Simpson, 30 Kan. 645, 2 Pac. 821, said: "The principle of the rule is that any agreement which operates to interfere with a public right, touching the character and good faith of common carriers, is an agreement against public policy and welfare, and is therefore void; and as an agreement that his negligence shall be cheap must operate in this way, it necessarily falls within that principle."

from liability for the whole nor any part of a loss brought about by its negligence. To our minds, it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so, the same considerations of public policy operating in each case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-nine hundredths of the loss so occasioned. With great unanimity, the authorities say it cannot do the former. If allowed to do the latter, it may thereby substantially evade and nullify the law, which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation by stipulation for exemption in whole or in part from the consequences of its negligent acts.”<sup>517</sup>

It is believed, however, that the power of common carriers to limit their liability, even in cases of negligence, to an amount less than the value of the property, is not in conflict with the general rule that common carriers cannot, by contract, limit their liability for loss occurring through their negligence,<sup>518</sup> but, rather,

<sup>517</sup> *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311.

<sup>518</sup> “Such a contract, fairly entered into, leaves the carrier responsible for its negligence, and simply fixes the rate of freight, and liquidates the damages. This we think it is competent for the carrier to do. And, where the reduced value is voluntarily fixed by the shipper, with a view of obtaining a low rate of freight, without any knowledge on the part of the carrier that the property was of greater value, it would be a fraud upon the carrier to permit the shipper to recover a greater sum than that fixed by him.” *Harvey v. Railroad Co.*, 74 Mo. 538. *McFadden v. Railroad Co.*, 92 Mo. 343, 4 S. W. 689, is not in conflict with this case. In the latter case it was held that an agreement, in consideration of an alleged reduced rate, to accept a limited valua-

is an exception to it. If, without any representation of value by the shipper, or a request of him for a statement of value, and without notice and contract, and a valuable consideration, the carrier should place a value upon the articles received for carriage, that would not bind the shipper.<sup>519</sup> In such case he would clearly have the right to recover the full value of the articles lost by the carrier. If, on the other hand, for the purpose of getting reduced rates, the shipper should place a value upon the article for carriage, or if, by any kind of artifice, he should induce the carrier to place a lower value upon the articles, and thus get reduced rates, it seems to be settled by the weight of authority that he could not recover beyond the value so fixed by him, or the value which, by deceit, he caused the carrier to fix.<sup>520</sup> To hold otherwise would be to enable the shipper to take advantage of his own wrong. Carriers have the right to fix their charges according to the value of the article to be carried. The greater the value, the greater the responsibility and liability in case of loss. For assuming these, the carrier is entitled to charge increased compensation.<sup>521</sup> If the shipper may, by false statements or artifice, deceive the carrier as to value, and thus get lower rates, and still recover from the carrier the full value, he

tion for the property in case of its loss through negligence of the carrier, is not binding on the shipper for want of a consideration, where the rate charged was, in fact, the regular and usual rate. Many of the cases cited in support of the former view may be similarly reconciled with the principles stated in this paragraph, when their facts are closely considered.

<sup>519</sup> *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821.

<sup>520</sup> *Rosenfeld v. Railroad Co.*, 103 Ind. 121, 2 N. E. 344; *Moses v. Railroad Co.*, 24 N. H. 71; *Durgin v. Express Co.* (N. H.) 20 Atl. 328; *Hill v. Railroad Co.*, 144 Mass. 284, 10 N. E. 836; *Graves v. Railroad Co.*, 137 Mass. 33; *Squire v. Railroad Co.*, 98 Mass. 239; *Magnin v. Dinsmore*, 70 N. Y. 419; *Steers v. Railroad Co.*, 57 N. Y. 1; *New York Cent. R. Co. v. Fraloff*, 100 U. S. 24; *Black v. Transportation Co.*, 55 Wis. 319, 13 N. W. 244; *Pacific Exp. Co. v. Foley*, 46 Kan. 457, 26 Pac. 665; *Harvey v. Railroad Co.*, 74 Mo. 538.

<sup>521</sup> *Lawson*, Carr. 88, 89, and cases cited. "It is the right of the carrier to require good faith on the part of those persons who deliver goods to be carried, or enter into contracts with him. The care to be exercised in transporting property, and the reasonable compensation for its carriage, depend largely on its nature and value; and such persons are bound to use no fraud or deception which would mislead him as to the extent of the duties or



is enabled to consummate a wrong upon the carrier which should not be sustained by the courts.<sup>522</sup> To hold the carrier liable in such a case for the full value of the article, beyond the representations of the shipper, would seem to be neither just nor reasonable, and, if neither just nor reasonable, such a holding is not demanded by any considerations of public policy.<sup>523</sup> This is the view taken by the supreme court of the United States in the leading case upon this subject.<sup>524</sup> The court say: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on.<sup>525</sup> The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence, up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation

the risks which he assumes. It is just and reasonable that a carrier should base his rate of compensation, to some extent, upon the value of the goods carried. This measures his risks, and is an important element in fixing his compensation. If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be barred by his representation and agreement. Otherwise, he imposes upon the carrier the obligations of a contract different from that into which he has entered. \* \* \* We cannot see that any considerations of a sound public policy require that such contracts should be held invalid, or that a person who, in such a contract, fixes a value upon his goods, which he intrusts to the carrier, should not be bound by his valuation." *Graves v. Railroad Co.*, 137 Mass. 33. See *Dunlap v. Steamboat Co.*, 98 Mass. 371; *Judson v. Railroad Co.*, 6 Allen, 486.

<sup>522</sup> *Graves v. Railroad Co.*, 137 Mass. 33; *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151.

<sup>523</sup> *Rosenfeld v. Railway Co.*, 103 Ind. 121, 2 N. E. 344.

<sup>524</sup> *Hart v. Railroad Co.*, 112 U. S. 331, 340, 5 Sup. Ct. 151.

<sup>525</sup> See *Graves v. Railroad Co.*, 137 Mass. 33; *Squire v. Railroad Co.*, 98 Mass. 239; *Rosenfeld v. Railroad Co.*, 103 Ind. 121, 2 N. E. 344; *Hopkins v. Westcott*, 6 Blatchf. 64, Fed. Cas. No. 6,692; *The Aline*, 25 Fed. 562; *The Hadji*, 18 Fed. 459.

of public policy. On the contrary, it would be repugnant to the soundest principles of fair dealing, and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." There is no injustice in restricting the shipper's claim for damages to the value he places upon his property for transportation. "If the plaintiff obtained the lowest rate of freight by shipping his horse as of ordinary value, it is not unreasonable that his recovery should be restricted to \$200, which was the amount of the risk the parties understood the plaintiff paid for, and the defendant assumed as carrier."<sup>526</sup>

But where there is an absence of any agreed valuation in the contract, and the limitation is merely as to the amount of recovery for damages caused by the defendant's negligence, the case comes within the general rule to the effect that the company can not contract for exemption, either in whole or in part, from liability for the negligence of itself or its employes.<sup>527</sup>

#### *Limiting Time and Manner of Presenting Claims.*

Common carriers may, by special contract, require any claim for damages to be presented within a given time, provided the time allowed be reasonable.<sup>528</sup> "This is a very reasonable and proper provision, to enable the defendants, while the matter is

<sup>526</sup> *Duntley v. Railroad Co.* (N. H.) 20 Atl. 327. See, also, *Magnin v. Dinsmore*, 62 N. Y. 35; *Graves v. Railroad Co.*, 137 Mass. 33; *Hill v. Railroad Co.*, 144 Mass. 284, 10 N. E. 836; *Alair v. Railroad Co.*, 53 Minn. 169, 54 N. W. 1072.

<sup>527</sup> *Abrams v. Railway Co.*, 87 Wis. 485, 58 N. W. 780; *Brown v. Steamship Co.*, 147 Mass. 58, 16 N. E. 717; *Boehl v. Railroad Co.*, 41 Minn. 191, 46 N. W. 333; *McFadden v. Railroad Co.*, 92 Mo. 343, 4 S. W. 689; *Weiler v. Railroad Co.*, 134 Pa. St. 310, 19 Atl. 702; *Dickson v. Railroad Co.*, 18 Q. B. Div. 176; *Black v. Transportation Co.*, 55 Wis. 319, 13 N. W. 244.

<sup>528</sup> *Gulf, C. & S. F. R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. 567; *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566; *Southern Exp. Co. v. Caldwell*, 21 Wall. 264; *Weir v. Express Co.*, 5 Phila. 355; *United States Exp. Co. v. Harris*, 51 Ind. 127; *Southern Exp. Co. v. Glenn*, 16 Lea, 472, 1 S. W. 102; *Lewis v. Railroad Co.*, 5 Hurl. & N. 867. Similar stipulations contained in insurance policies are sustained. *Steen v. Insurance Co.*, 89 N. Y. 315. Likewise in telegraph contracts. *Cole v. Telegraph Co.*, 33 Minn. 227, 22 N. W. 385.

still fresh, to institute proper inquiries and furnish themselves with evidence on the subject. The defendants do a large business, and to allow suits to be brought against them, without such notice, at any length of time, would be to surrender them, bound hand and foot, to almost every claim which might be made. It would be next to impossible, when a thousand packages, large and small, are forwarded by them daily, to ascertain anything about the loss of one of them, at a distance of six months or a year."<sup>529</sup> What is a reasonable time depends upon the circumstances of each case.<sup>530</sup> Thus, a stipulation requiring a consignee of cattle to present any claim for damages at the time the cattle were received, and before they were unloaded and mingled with other cattle, was held reasonable and valid.<sup>581</sup> But a stipula-

<sup>529</sup> *Weir v. Express Co.*, 5 Phila. 355.

<sup>530</sup> The following periods have been held reasonable: Ninety days, *Southern Exp. Co. v. Caldwell*, 21 Wall. 264. Thirty days, *Hirshberg v. Dinsmore*, 12 Daly (N. Y.) 429; *Smith v. Dinsmore*, 9 Daly (N. Y.) 188; *Kaiser v. Hoey* (City Ct. N. Y.) 1 N. Y. Supp. 429; *Southern Exp. Co. v. Hunnicutt*, 54 Mass. 566; *Glenn v. Express Co.*, 86 Tenn. 594, 8 S. W. 152; *Weir v. Express Co.*, 5 Phila. 355. Five days, *Chicago & A. R. Co. v. Simms*, 18 Ill. App. 68; *Dawson v. Railroad Co.*, 76 Mo. 514. Sixty days, *Thompson v. Railroad Co.*, 22 Mo. App. 321. Seven days, *Lewis v. Railway Co.*, 5 Hurl. & N. 867. The following periods have been held unreasonable: Sixty days from date of contract, *Pacific Exp. Co. v. Darnell* (Tex. Sup.) 6 S. W. 765. Thirty days from date of contract, *Adams Exp. Co. v. Reagan*, 29 Ind. 21; *Southern Exp. Co. v. Caperton*, 44 Ala. 101. Where the period is fixed without reference to the time of loss or length of journey, it is unreasonable. *Porter v. Express Co.*, 4 S. C. 135; *Pacific Exp. Co. v. Darnell* (Tex. Sup.) 6 S. W. 765; *Southern Exp. Co. v. Caperton*, 44 Ala. 101. But see *Southern Exp. Co. v. Caldwell*, 21 Wall. 264. And cf. *Central Vermont R. Co. v. Soper*, 8 U. C. A. 341, 59 Fed. 879. What is a reasonable time is a question of law for the court. *Heimann v. Telegraph Co.*, 57 Wis. 562, 16 N. W. 32; *Browning v. Railroad Co.*, 2 Daly (N. Y.) 117. Failure to present a claim within the stipulated time is not a bar to recovery, if the failure was caused without the owner's fault. *Glenn v. Express Co.*, 86 Tenn. 594, 8 S. W. 152.

<sup>581</sup> *Goggin v. Railroad Co.*, 12 Kan. 416. Compare *Smith v. Louisville & N. R. Co.*, 86 Tenn. 198, 6 S. W. 209. As to what is removing or intermingling, see *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017. See, generally, *The Santee*, 2 Ben. 519, Fed. Cas. No. 12,328; *Rice v. Railroad Co.*, 63 Mo. 314; *Sprague v. Railroad Co.*, 34 Kan. 347, 8 Pac. 465; *Owen v. Railroad Co.*, 87 Ky. 626, 9 S. W. 698.

tion requiring goods to be examined before leaving the station, as applied to a car load of cotton, is not reasonable.<sup>532</sup> So, likewise, a contract regulating the manner of presenting claims is valid, provided it is reasonable.<sup>533</sup> For example, a contract requiring notice of loss to be made in writing,<sup>534</sup> or at the place of shipment, is valid.<sup>535</sup> The limitation may, of course, be waived by the carrier.<sup>536</sup>

### *Consideration.*

A contract limiting liability, to be effectual, must, of course, be supported by a consideration.<sup>537</sup> As common carriers are bound to carry without any contract limiting their liability, their mere agreement to carry does not furnish a consideration for an agreement to limit liability.<sup>538</sup> But it is a sufficient consideration if they agree to carry for a reduced compensation because their

<sup>532</sup> *Capehart v. Railroad Co.*, 81 N. C. 438. See, also, *Owen v. Railroad Co.*, 87 Ky. 626, 9 S. W. 698; *Rice v. Railroad Co.*, 63 Mo. 314; *Sprague v. Railroad Co.*, 34 Kan. 347, 8 Pac. 465. Such a stipulation does not apply to latent injuries, which could not be discovered at the time of delivery. *Ormsby v. Railroad Co.*, 4 Fed. 170, 706; *Capehart v. Railroad Co.*, 77 N. C. 355.

<sup>533</sup> A requirement that the claim be verified by affidavits is valid. *Black v. Railroad Co.*, 111 Ill. 351. Cf. *International & G. N. Ry. Co. v. Underwood*, 62 Tex. 21. Notice in writing to a particular officer may be required. *Dawson v. Railway Co.*, 76 Mo. 514. Cf. *Baltimore & O. Exp. Co. v. Cooper*, 66 Miss. 558, 6 South. 327.

<sup>534</sup> *Hirshberg v. Dinsmore*, 12 Daly (N. Y.) 429; *Chicago & A. R. Co. v. Simms*, 18 Ill. App. 68. But see *Smitha v. Railroad Co.*, 86 Tenn. 198, 6 S. W. 209.

<sup>535</sup> The requirement is waived where the carrier has no officer at the place named to whom notice could be given. *Good v. Railroad Co.* (Tex. Sup.) 11 S. W. 854; *Missouri Pac. Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574.

<sup>536</sup> *Chicago & E. I. R. Co. v. Katzenbach*, 118 Ind. 174, 20 N. E. 709; *Rice v. Railroad Co.*, 63 Mo. 314; *Owen v. Railroad Co.* (Ky.) 9 S. W. 811; *Hudson v. Railroad Co.* (Iowa) 60 N. W. 608. Receipt and consideration of an unverified claim is a waiver of a stipulation requiring a verified one. *Wabash R. Co. v. Brown*, 152 Ill. 484, 39 N. E. 273. See, also, *Bennett v. Railroad Co.*, 12 Or. 49, 6 Pac. 160.

<sup>537</sup> *Lawson*, *Bailm.* § 157; *Hutch. Carr.* § 278.

<sup>538</sup> *Bissell v. Railroad Co.*, 25 N. Y. 442; *McMillan v. Railroad Co.*, 16 Mich. 79; *German v. Railroad Co.*, 38 Iowa, 127. See, also, *Missouri, K. & T. Ry. Co. v. Carter* (Tex. Civ. App.) 29 S. W. 565; *Kansas Pac. R. Co. v. Reynolds*, 17 Kan. 251. A common carrier has no right to demand of a shipper a waiver



liability is limited,<sup>539</sup> or do something which they are not already bound to do, such as receiving a passenger on freight trains,<sup>540</sup> or carrying a customer free of charge.<sup>541</sup> A sufficient consideration will be presumed, in the absence of evidence to the contrary.<sup>542</sup> But it may well be doubted whether such a presumption is necessary. If the rate of compensation were fixed by law, so that the carrier could charge neither more nor less than a given amount for the transportation of freight, an agreement to carry for such rate would not be any consideration for an agreement on the part of the shipper limiting the carrier's liability.<sup>543</sup> So an agreement to carry at the highest rate allowed by law furnishes no consideration for a contract limiting the carrier's liability.<sup>544</sup> But, where the carrier might have charged more for the carriage, the agreement limiting liability is supported by a consideration, although the rate charged was in fact the usual rate charged to all persons alike.<sup>545</sup> The undertaking to carry at the agreed rate is the con-

of his rights as a condition precedent to receiving freight. *Missouri Pac. Ry. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749.

<sup>539</sup> *Bissell v. Railroad Co.*, 25 N. Y. 442; *Nelson v. Railroad Co.*, 48 N. Y. 498; *Jennings v. Railway Co.* (Sup.) 5 N. Y. Supp. 140; *Dillard v. Railroad Co.*, 2 Lea, 288. A stipulation in a bill of lading exempting the receiving carrier from his common-law liability for the loss of goods while in its warehouse, at the end of its line, and before delivering to the connecting carrier, is void, unless there is a special consideration for such exemption, other than the mere receipt of the goods, and the undertaking to carry them. *Wehmann v. Railway Co.*, 58 Minn. 22, 59 N. W. 546.

<sup>540</sup> *Arnold v. Railroad Co.*, 83 Ill. 273.

<sup>541</sup> *Bissell v. Railroad Co.*, 25 N. Y. 442.

<sup>542</sup> *York v. Railroad Co.*, 3 Wall. 107; *Louisville & N. R. Co. v. Oden*, 80 Ala. 38.

<sup>543</sup> *Hutch. Carr.* § 228; *Wehmann v. Railway Co.*, 58 Minn. 22, 59 N. W. 546. Where a statute requires a railroad carrying United States mail to carry a postal clerk with the mail without charge, a limitation of the carrier's liability, contained in a pass issued to such postal clerk, is without consideration and void. *Seybolt v. Railroad Co.*, 95 N. Y. 562.

<sup>544</sup> See cases cited in note 538, *supra*.

<sup>545</sup> In *Duvenick v. Railroad Co.*, 57 Mo. App. 550, it was said that a reduced rate, to be a consideration, must be in fact a reduced rate (citing *McFadden v. Railway Co.*, 92 Mo. 343, 4 S. W. 689); but that it did not follow that, because the rate charged in a given contract was the same rate charged everybody who shipped under like contracts, it was not a reduced rate. In



sideration for the agreement of the shipper, as the liability of the shipper to pay such rate was the consideration for the agreement of the carrier to transport. This is a mutual and sufficient consideration; the same that exists in the ordinary case of shipment of goods, with or without a special contract.<sup>546</sup> "The parties being left free to make their own contract, and having agreed that, in consideration of the payment of a certain price by one, certain services, upon stipulated terms as to responsibility, shall be performed by the other, neither can allege that, as to him, there was no consideration."<sup>547</sup>

*Construction.*

Contracts limiting liability are to be construed strictly against the carrier.<sup>548</sup> All doubts and ambiguities will be resolved in favor of the shipper.<sup>549</sup> Thus, where a carrier has given two notices, he is bound by the one least beneficial to himself.<sup>550</sup> Specific exemptions will not be enlarged by the use of general lan-

this case it appeared that the reason the carrier never charged any other rate was because he always took shipments under contracts containing similar limitations of liability; but the court seemed to think that there would be no consideration unless the carrier had in force, and for practical application, a higher rate for shipments made without contracts limiting liability than the rate charged for shipments made under contracts limiting liability. See *Paddock v. Railroad Co.*, 1 Mo. App. Rep'r. 87. In *Hance v. Railroad Co.*, 56 Mo. App. 476, it is held that, where the rate charged is the usual rate, a stipulation limiting liability is without consideration. See, also, *Kellerman v. Railroad Co.* (Mo. Sup.) 34 S. W. 41.

<sup>546</sup> *Nelson v. Railroad Co.*, 48 N. Y. 498. See, also, *Kirby v. Express Co.*, 2 Mo. App. 369; *Hutchinson v. Railroad Co.*, 37 Minn. 524, 35 N. W. 433.

<sup>547</sup> *Hutch. Carr.* § 278.

<sup>548</sup> *Magnin v. Dinsmore*, 56 N. Y. 168; *Edsall v. Railroad Co.*, 50 N. Y. 661; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; *Levering v. Union Transp. Co.*, 42 Mo. 88; *Rosenfeld v. Railroad Co.*, 103 Ind. 121, 2 N. E. 344; *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 302; *Gronstadt v. Wiltthoff*, 15 Fed. 265; *Marx v. Steamship Co.*, 22 Fed. 680; *Ayres v. Railroad Corp.*, 14 Blatchf. 9, Fed. Cas. No. 689.

<sup>549</sup> *Kansas City, M. & B. R. Co. v. Holland*, 68 Miss. 351, 8 South. 516; *Black v. Transportation Co.*, 55 Wis. 319, 13 N. W. 244; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 Ark. 523.

<sup>550</sup> *Munn v. Baker*, 2 Starkie, 255. And see *Edsall v. Railroad Co.*, 50 N. Y. 661; *Airey v. Merrill*, 2 Curt. S. Fed. Cas. No. 115.

guage in the same connection. For example, a release from liability for loss arising from "leakage or decay, chafing or breakage, or from any other cause," does not exempt the carrier from liability for loss by fire.<sup>551</sup> An exemption from liability for loss through any particular cause does not include negligent losses of that character.<sup>552</sup> So, also, it has been held that specific exemptions from liability for loss by certain perils will make the carrier liable for losses by perils against which he is ordinarily not an insurer. This is on the principle that "*expressio unius est exclusio alterius*."<sup>553</sup> A special contract limiting the carrier's liability does not change his character from that of a common carrier to that of an ordinary bailee. It merely limits his liabilities, leaving him, in all other respects, a common carrier still, having all the rights and subject to all the duties of common carriers.<sup>554</sup>

As to the validity of contracts limiting liability, the law of the place where the contract was made will govern,<sup>555</sup> unless the contracting parties clearly had some other law in view.<sup>556</sup> But whether the facts show that a contract has been made, or not, must be determined by the law at the place of trial. This is a question of evidence. It relates to the remedy, and not to the

<sup>551</sup> *Menzell v. Railroad Co.*, 1 Dillon, 531, Fed. Cas. No. 9,429. See, also, *Hawkins v. Railroad Co.*, 17 Mich. 57.

<sup>552</sup> *Ashmore v. Pennsylvania Steam Towing & Transp. Co.*, 28 N. J. Law, 180; *Mynard v. Railroad Co.*, 71 N. Y. 180. But see *Cragin v. Railroad Co.*, 51 N. Y. 61. See, also, ante, p. 359. An exemption from liability for delay does not cover a negligent delay. *McKay v. Railroad Co. (Sup.)* 3 N. Y. Supp. 708.

<sup>553</sup> *Fish v. Chapman*, 2 Ga. 349. In *Gage v. Tirrell*, 9 Allen, 299, it was held that, under a bill of lading providing for delivery, the "dangers of the sea only excepted," the carrier was not liable for loss by act of public enemy.

<sup>554</sup> *Hutch. Carr.* §§ 41, 45; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Davidson v. Graham*, 2 Ohio St. 131. But see *Penn. v. Railroad Co.*, 49 N. Y. 204; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329.

<sup>555</sup> *Talbott v. Transportation Co.*, 41 Iowa, 247; *Fonseca v. Steamship Co.*, 153 Mass. 553, 27 N. E. 665; *Hoadley v. Transportation Co.*, 115 Mass. 304; *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 7 S. E. 916; *McDaniel v. Railway Co.*, 24 Iowa, 412; *Cantu v. Bennett*, 39 Tex. 303; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283. Compare *Dyke v. Railway Co.*, 45 N. Y. 113; *Curtis v. Railroad Co.*, 74 N. Y. 116.

<sup>556</sup> *Liverpool & G. W. Steam Co. v. Insurance Co. of North America*, 129 U. S. 397, 9 Sup. Ct. 480; *In re Missouri Steamship Co.*, 42 Ch. Div. 321.

right. The *lex loci contractus* determines the validity of a contract. The *lex fori* controls the admission of evidence, and the remedy upon the contract.<sup>557</sup>

*When Contract Inures to Benefit of Connecting Lines.*

As will be seen hereafter, a common carrier may, by special contract, bind himself for transportation over connecting lines to points beyond his own line; and, if he does so, he is liable as carrier for the whole route.<sup>558</sup> In such a case the stipulations in the special contract between the owner and the first carrier inure to the benefit of the connecting carrier.<sup>559</sup> This is upon the theory that the compensation being fixed with reference to the liability assumed, and the first carrier being liable for the entire transportation, such carrier has an interest in making the exception commensurate with the scope and duration of the contract, and the connecting lines acting under its employment are entitled to the benefits of the contract.<sup>560</sup>

<sup>557</sup> *Hoadley v. Transportation Co.*, 115 Mass. 304. And see *Faulkner v. Hart*, 82 N. Y. 413.

<sup>558</sup> See post, p. 463. A carrier may limit his liability to losses occurring on his own line. *Wabash R. Co. v. Harris*, 55 Ill. App. 159; *Texas & P. Ry. Co. v. Hawkins* (Tex. Civ. App.) 30 S. W. 1113; *Hill v. Railroad Co.* (S. C.) 21 S. E. 337; *Minter v. Railroad Co.*, 56 Mo. App. 282; *Rogers v. Railroad Co.* (Tex. Civ. App.) 28 S. W. 1024. No special consideration is necessary to sustain such a stipulation. *Hance v. Railroad Co.*, 56 Mo. App. 476. When connecting carriers are partners in the transportation of freight, a stipulation in the contract of shipment, providing that the company shall not be liable for injuries to property after it has passed beyond its line, does not relieve it from liability for such injuries. *Gulf, C. & S. F. R. Co. v. Wilson* (Tex. Civ. App.) 26 S. W. 131.

<sup>559</sup> *Maghee v. Railroad Co.*, 45 N. Y. 514. Cf. *Erle R. Co. v. Wilcox*, 84 Ill. 239; *Lamb v. Railroad Co.*, 46 N. Y. 271.

<sup>560</sup> *Maghee v. Railroad Co.*, 45 N. Y. 514; *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594; *Manhattan Oil Co. v. Camden, etc., R. & C. Co.*, 54 N. Y. 197; *Whitworth v. Railroad Co.*, 87 N. Y. 413; *Halliday v. Railroad Co.*, 74 Mo. 159; *Levy v. Express Co.*, 4 S. C. 234. Whenever the carrier is bound, by contract or by law, to carry to destination, all carriers who engage in the transportation for any portion of the route are entitled to all the protection which the first carrier has secured by his contract with the shipper. *Hutch. Carr.* § 273; *Whitworth v. Railroad Co.*, supra; *Kiff v. Railroad Co.*, 32 Kan. 263, 4 Pac. 401.

But where the contract with the first carrier is only for transportation over its own line, and delivery to the connecting carrier, the latter is not entitled to the benefit of limitations contained in the contract between the shipper and the first carrier.<sup>561</sup> In this class of cases the contract is not intended as a through contract, and therefore, as no rate of freight is agreed upon for any part of the route beyond the terminus of the first carrier's route, there is no consideration for an agreement by the shipper to relieve the connecting carrier of his common-law liabilities.<sup>562</sup> No such agreement is in fact made by the shipper, and the first carrier, acting as a forwarding agent, has no authority to do so for him. It is said, however, that the first of the connecting carriers, though not bound for the entire transportation, may, on delivery to the connecting carrier, enter into a contract with the latter, binding upon the owner, for a similar limitation of liability to that under which the first carrier received the goods, but not for any different limitations.<sup>563</sup>

The question as to what contracts will be construed to be contracts for through transportation, and what contracts to transport merely to the terminus of the first carrier's line, will be considered hereafter, when the subject of delivery to connecting carriers is specifically treated.<sup>564</sup>

#### *Bills of Lading as Contracts and Receipts.*

"The bill of lading or shipping receipt may serve a double purpose,—that of a receipt for the goods, and that of a contract for

<sup>561</sup> *Babcock v. Railroad Co.*, 49 N. Y. 491; *Merchants' Dispatch Transp. Co. v. Bolles*, 80 Ill. 473; *Bancroft v. Transportation Co.*, 47 Iowa, 262; *Adams Exp. Co. v. Harris*, 120 Ind. 73, 21 N. E. 340; *Martin v. Express Co.*, 19 Wis. 336; *Camden & A. R. Co. v. Forsyth*, 61 Pa. St. 81; *Aetna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Western & A. R. Co. v. Cotton Mills*, 81 Ga. 523, 7 S. E. 916. See, also, *Taylor v. Railroad Co.*, 39 Ark. 148.

<sup>562</sup> *Babcock v. Railroad Co.*, 49 N. Y. 491. "The connecting carrier, in such case, is not only a stranger to the contract, but to its consideration. There can be no presumption that there has been, on his part, any abatement of his charges as a consideration for exemption from liability on the part of the owner of the goods; and, there being no express contract with him, the law will not imply one for his benefit." *Hutch. Carr.* § 272.

<sup>563</sup> *Lamb v. Transportation Co.*, 46 N. Y. 271.

<sup>564</sup> See post, p. 463.

their transportation. So far as it provides as to terms and manner of shipment, and liability of the carrier, it constitutes a contract, and cannot be varied by parol evidence of a prior or contemporaneous oral agreement.<sup>565</sup> But, so far as it constitutes a receipt for the goods, it can be varied by parol evidence as to quantity or condition, as between the immediate parties, but not as against an assignee thereof for value without notice, unless it be shown to have been issued without any authority whatever.<sup>566</sup> The bill or receipt will be considered as issued wholly without authority, and therefore as not estopping the carrier, if it is issued by the agent without the receipt of any goods thereunder."<sup>567</sup>

*End Act Feb 15-4*

**92. NOTICES LIMITING LIABILITY**—Notices affecting liability may be divided into two classes:

- (a) Notices effectual only when assented to by the shipper (p. 437).
- (b) Notices effectual without assent of the shipper, when brought home to him (p. 445).

**93. Notices limiting liability are of no effect unless assented to by the shipper.** Assent cannot be inferred from mere delivery after knowledge of the notice.

It has been seen that common carriers have power to limit their liability, to a certain extent, by contract. In England it is held

<sup>565</sup> The Delaware, 14 Wall. 579; Garden Grove Bank v. Humeston & S. Ry. Co., 67 Iowa, 526, 25 N. W. 761; Louisville, E. & St. L. R. Co. v. Wilson, 119 Ind. 352, 21 N. E. 341.

<sup>566</sup> O'Brien v. Gilchrist, 34 Me. 554; Relyea v. Mill Co., 42 Conn. 579; Sioux City & P. R. Co. v. First Nat. Bank, 10 Neb. 556, 7 N. W. 311; St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132.

<sup>567</sup> McClain, Carr. p. 11; The Freeman v. Buckingham, 18 How. 182; Polard v. Vinton, 105 U. S. 7, 5 Myers, Fed. Dec. 158; Friedlander v. Railroad Co., 130 U. S. 416, 9 Sup. Ct. 570; Bank v. Wisconsin Cent. Ry. Co., 44 Minn. 224, 46 N. W. 342, 560. Contra, Armour v. Railroad Co., 65 N. Y. 111; Brooke v. Railroad Co., 108 Pa. St. 529, 1 Atl. 206; Bank of Batavia v. New York, L. E. & W. R. Co., 106 N. Y. 195, 12 N. E. 433; Grant v. Norway, 10 C. B. 665. As to Mississippi statute, making bills of lading conclusive evidence of receipt of goods, see The Guiding Star, 10 C. C. A. 454, 62 Fed. 407.



that they may do so, even by a general notice to that effect, if knowledge of such notice is brought home to the shipper.<sup>568</sup> But in this country the rule is well established that notices limiting liability are of no avail unless assented to by the shipper,<sup>569</sup> in which case a contract is established,<sup>570</sup> and the principles already discussed are applicable. The American rule finds its reason in the nature of a common carrier's duty to the public. It is a common carrier's duty to carry for all who offer, and it cannot divest itself of this duty by any *ex parte* act of its own, short of ceasing to be a common carrier. Subject to reasonable regulations, every man has a right to insist that his property, if of such description as the carrier assumes to convey, shall be transported subject to the carrier's common-law liability. A common carrier has no right to refuse goods offered for carriage at the proper time and place, on tender of the usual and reasonable compensation, unless the owner will consent to his receiving them under a reduced liability, and the owner can insist on his receiving the goods under all the risks and responsibilities the law annexes to his employment.<sup>571</sup> The fact that a restrictive notice is shown to have been actually received or seen by the owner of the goods will not raise the presumption that he assents to its terms, since it is as reasonable to infer that he intends to insist on his rights as that he assents to their qualification, and the burden of proof is

<sup>568</sup> *Maving v. Todd*, 1 Starkie, 72; *Nicholson v. Willan*, 5 East, 507; *Leeson v. Holt*, 1 Starkie, 186; *London & N. W. Ry. Co. v. Dunham*, 18 C. B. 826; *Hutch. Carr.* §§ 228, 229.

<sup>569</sup> *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Dorr v. Navigation Co.*, 11 N. Y. 485; *McMillan v. Railroad Co.*, 16 Mich. 79; *Blumenthal v. Brainerd*, 38 Vt. 402; *Little v. Railroad Co.*, 66 Me. 239.

<sup>570</sup> *Wheeler, Carr.* 231; *Gott v. Dinsmore*, 111 Mass. 45, 52; *Fibel v. Livingston*, 64 Barb. 179; *Southern Exp. Co. v. Crook*, 44 Ala. 468; *Brown v. Express Co.*, 15 W. Va. 812; *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 186; *Blumenthal v. Brainerd*, 38 Vt. 402. But see, *contra*, *Camden & A. R. Co. v. Baldauf*, 16 Pa. St. 67.

<sup>571</sup> See *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, 19 Wend. 251; *Jones v. Voorhees*, 10 Ohio, 145; *Bennett v. Dutton*, 10 N. H. 481, 487; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 382; *Moses v. Railroad*, 24 N. H. 71; *Kimball v. Railroad Co.*, 26 Vt. 256; *Dorr v. Navigation Co.*, 4 Sandf. 136, 11 N. Y. 485; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243; *Slocum v. Fairchild*, 7 Hill, 292.

upon the carrier to establish the contract qualifying his liability, if he claims that one exists.<sup>572</sup> "Conceding that there may be a special contract for a restricted liability," says Bronson, J., in a leading American case,<sup>573</sup> "such a contract cannot, I think, be inferred from a general notice brought home to the employer. The argument is that where a party delivers goods to be carried, after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of the goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than \$100, the assent of the customer to pay that sum, though it be double the value, may, perhaps, be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now, the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can, at the most, only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities."

<sup>572</sup> *McMillan v. Railroad Co.*, 16 Mich. 79, 111 (per Cooley, J.); *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 383 (per Nelson, J.).

<sup>573</sup> *Hollister v. Nowlen*, 19 Wend. 234, 245.

*What Constitutes Assent—Modes of Giving Notice.*

A notice therefore amounts to no more than a proposal for a contract,<sup>574</sup> and, inasmuch as it must be assented to by the shipper before it becomes binding as a contract, it becomes important to determine what facts will amount to assent.

In the first place, it is obvious that the terms and conditions of a notice cannot be assented to unless they are known to the shipper. Carriers have adopted various means to bring the notice home to him, such as advertisements in newspapers, posting notices, or printing notices upon bills of lading, receipts, tickets, and the like.

The custom of publishing notices in newspapers has been almost abandoned. There is no presumption that even a person who takes a paper reads all its contents; hence, it is difficult, if not impossible, to charge a person with notice given in that way.<sup>575</sup> The same objection applies to notices by means of signs, posters, or handbills, and the like. A person may see a sign without reading it.<sup>576</sup>

*Same—Bills of Lading.*

The custom of printing notices limiting liability upon bills of lading, receipts, tickets, baggage checks, and the like, originated in a suggestion of the English judges that the giving of a written memorandum of the terms upon which the goods were received would "put an end to the litigation which the notices of carriers now give occasion to."<sup>577</sup>

As to bills of lading, and other commercial instruments of like character, it has been held that persons receiving them are presumed to know, from their uniform character and the nature of the business, that they contain the terms upon which the property is to be car-

<sup>574</sup> Lawson, Carr. § 101; Hollister v. Nowlen, 19 Wend. 234.

<sup>575</sup> Michigan Cent. R. Co. v. Hale, 6 Mich. 243; Barney v. Prentiss, 4 Har. & J. (Md.) 317; Judson v. Railroad Corp., 6 Allen, 486; Rowley v. Horne, 3 Bing. 2; Munn v. Baker, 2 Starkie, 255; Baldwin v. Collins, 9 Rob. (La.) 468.

<sup>576</sup> Clayton v. Hunt, 3 Camp. 27; Butler v. Heane, 2 Camp. 415; Brooke v. Pickwick, 4 Bing. 218; Kerr v. Willan, 6 Maule & S. 150, 2 Starkie, 53; Hollister v. Nowlen, 19 Wend. 234; Gleason v. Transportation Co., 32 Wis. 85; Lake Shore & M. S. Ry. Co. v. Greenwood, 79 Pa. St. 373; Cantling v. Railroad Co., 54 Mo. 385.

<sup>577</sup> Riley v. Horne, 5 Bing. 217 (per Best, C. J.). See, also, Rowley v. Horne, 3 Bing. 2; Kerr v. Willan, 6 Maule & S. 150, 2 Starkie, 53; Shelton v. Transportation Co., 59 N. Y. 258; Oppenheimer v. Express Co., 69 Ill. 62.

ried.<sup>578</sup> Delivery to a shipper of a shipping receipt or bill of lading containing stipulations specifying the terms of the shipment will constitute a contract, if accepted, although express assent to such terms is not shown.<sup>579</sup> But to have this effect the receipt or bill must be delivered before the transportation is entered upon by the carrier, and while it is still in the power of the shipper to recall the goods.<sup>580</sup> But if the shipper knew the contents of the usual bill of lading issued by the carrier, and also a custom of the carrier to deliver such bills after shipment, he will be bound thereby.<sup>581</sup> It must also be delivered to some one authorized to act for the consignor in the shipment of the goods. But a person authorized to ship has such authority as to bind the consignor by acceptance of the receipt or bill.<sup>582</sup> The acceptance of such bill or receipt by the consignor binds the consignee.<sup>583</sup> "Bills of lading are signed by the carrier only, and, where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract without objection is commonly conclusive. I do not perceive that bills of lading stand upon any different footing. If the carrier should cause limitations upon his liability to be inserted in the contract in such a manner as not to attract the consignor's attention, the question of assent might fairly

<sup>578</sup> *Blossom v. Dodd*, 43 N. Y. 264, 269.

<sup>579</sup> *Grace v. Adams*, 100 Mass. 505; *Mulligan v. Railway Co.*, 36 Iowa, 181; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Anchor Line v. Dater*, 68 Ill. 369. Even though he neglects to read its terms. *Davis v. Railroad Co.*, 66 Vt. 290, 29 Atl. 313. Acceptance of a bill of lading is not conclusive evidence that the shipper assented to a stipulation limiting the carrier's liability to his own line. *Wabash R. Co. v. Harris*, 55 Ill. App. 159. See, also, *Schulze-Berge v. The Guildhall*, 58 Fed. 796.

<sup>580</sup> *Wilde v. Transportation Co.*, 47 Iowa, 247; *Merchants' Dispatch Transp. Co. v. Furthmann*, 149 Ill. 66, 36 N. E. 624, affirming 47 Ill. App. 561; *Michigan Cent. R. Co. v. Boyd*, 91 Ill. 268. Where a shipper loads his cattle under a parol contract, such contract governs a written contract given him just as the train was starting. *Missouri, K. & T. Ry. Co. v. Carter* (Tex. Civ. App.) 29 S. W. 565.

<sup>581</sup> *Shelton v. Transportation Co.*, 59 N. Y. 258.

<sup>582</sup> *Nelson v. Railroad Co.*, 48 N. Y. 498; *Squire v. Railroad Co.*, 98 Mass. 239.

<sup>583</sup> *McClain, Carr.* p. 11; *Robinson v. Transportation Co.*, 45 Iowa, 470.

be considered an open one;<sup>584</sup> and, if delivery of the bill of lading was made to the consignor under such circumstances as to lead him to suppose it to be something else,—as, for instance, a mere receipt for money,—it could not be held binding upon him as a contract, inasmuch as it had never been delivered to and accepted by him as such.<sup>585</sup> But, except in these and similar cases, it cannot become a material question whether the consignor read the bill of lading or not.”<sup>586</sup>

*Same—Express Receipts.*

Express receipts stand upon the same footing as bills of lading. When accepted without objection, they constitute the contract between the parties.<sup>587</sup> Originally it was held that the mere delivery of such receipts did not amount to a contract, unless the terms were read and assented to by the shipper.<sup>588</sup> But the practice of embody-

<sup>584</sup> *Brown v. Railroad Co.*, 11 Cush. 97.

<sup>585</sup> *King v. Woodbridge*, 34 Vt. 565.

<sup>586</sup> *McMillan v. Railroad Co.*, 16 Mich. 79. But where the notice is printed on the back of a paper, and not in and as a part of the proposed contract, assent is not implied by acceptance. *Michigan Cent. R. Co. v. Mineral Springs Manuf'g Co.*, 16 Wall. 318; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243; *The Isabella*, 8 Ben. 139, Fed. Cas. No. 7,099; *Newell v. Smith*, 49 Vt. 253; *Ayres v. Railroad Corp.*, 14 Blatchf. 9, Fed. Cas. No. 689. In *Western Transp. Co. v. Newhall*, 24 Ill. 466, there was said to be no difference between notices by advertisement or placard and notices printed on the back of a receipt.

<sup>587</sup> *Huntington v. Dinsmore*, 4 Hun, 66, 6 Thomp. & C. 195; *Snider v. Express Co.*, 63 Mo. 376; *Soumet v. Express Co.*, 66 Barb. 284; *Brehme v. Express Co.*, 25 Md. 328; *Christenson v. Express Co.*, 15 Minn. 270 (Gil. 208); *Kirkland v. Dinsmore*, 62 N. Y. 171; *Belger v. Dinsmore*, 51 N. Y. 166; *Magnin v. Dinsmore*, 56 N. Y. 168; *Westcott v. Fargo*, 61 N. Y. 542; *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Merchants' Despatch Transp. Co. v. Leysor*, 89 Ill. 43; *Grace v. Adams*, 100 Mass. 505; *Boorman v. Express Co.*, 21 Wis. 152. But see *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; *Adams Exp. Co. v. Sier*, 55 Ill. 140. In Illinois carriers are forbidden to limit their liability by stipulations in the receipt given for the property. But see *Illinois Cent. R. Co. v. Jonte*, 13 Ill. App. 424. In Dakota and Michigan the shipper's assent is by statute required to be shown by his signature. *Hartwell v. Express Co.*, 5 Dak. 463, 41 N. W. 732; *Feige v. Railroad Co.*, 62 Mich. 1, 28 N. W. 685. And see *Southern Exp. Co. v. Newby*, 36 Ga. 635.

<sup>588</sup> *Kirkland v. Dinsmore*, 2 Hun, 46, 4 Thomp. & C. 304, reversed 62 N. Y. 171; *Belger v. Dinsmore*, 51 Barb. 69, reversed 51 N. Y. 166; *Adams Exp. Co. v. Nock*, 2 Duv. (Ky.) 562; *Kember v. Express Co.*, 22 La. Ann. 158.



ing the terms of shipment in such receipts has become so general that they are no longer distinguishable from bills of lading.

A distinction, however, must be observed between the great express companies of the country, and local express companies receiving baggage from travelers for transportation to their immediate destination. In the latter case there is nothing in the nature of the transaction or the custom of the trade which should naturally lead the shipper to suppose that he was receiving and accepting the written evidence of a contract, and therefore he is not bound by the terms of the receipt received, in the absence of other evidence that he assented thereto.<sup>589</sup>

*Same—Tickets, Baggage Checks, Receipts, Etc.*

Assent to conditions and limitations printed on railroad and steamboat tickets, baggage checks, receipts, and the like, is not presumed from a mere acceptance without objection.<sup>590</sup> The reason for this is that the nature of such instruments is not such as to necessarily convey to the mind of the shipper the idea of a contract, in such a manner as to raise the presumption that he knew it was a contract expressive of the terms upon which the property was carried, or limiting the liability of the carrier. For example, a railroad ticket does not generally contain any contract, and is not intended to do so. "It is a mere token or voucher, adopted for convenience, to show that the passenger has paid his fare from one place to another."<sup>591</sup> Therefore a passenger is not bound by a notice, printed on the face of his ticket, limiting the weight and value of his baggage, unless his attention is called to the notice, or he is aware of it at the time the ticket is purchased.<sup>592</sup> Nor even then unless he assents to

<sup>589</sup> Wheeler, Carr. p. 225; Blossom v. Dodd, 43 N. Y. 264.

<sup>590</sup> Prentice v. Decker, 49 Barb. 21; Limburger v. Westcott, 49 Barb. 283; Sunderland v. Westcott, 2 Sweeney (N. Y.) 260; Isaacson v. Railroad Co., 91 N. Y. 278; and cases cited infra.

<sup>591</sup> Rawson v. Railroad Co., 48 N. Y. 212, 217. Cf. Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647.

<sup>592</sup> Rawson v. Railroad Co., 48 N. Y. 212; Mauritz v. Railroad Co., 23 Fed. 765. But one who accepts and travels on a "contract ticket" issued by a steamship company for the voyage from England to America, which ticket contained two quarto papers of printed matter, describing the rights and liabilities of the parties, is bound by the stipulations therein, though he has not read or signed. Fonseca v. Steamship Co., 153 Mass. 553, 27 N. E. 665.

it,<sup>593</sup> though, perhaps, such assent could be implied from acceptance without objection.<sup>594</sup> So tokens given in exchange for baggage checks are not of such a nature as to put persons on their guard as to memoranda printed upon them, and persons receiving them are not presumed to know their contents, or to assent to them.<sup>595</sup>

In *Madan v. Sherard*,<sup>596</sup> where plaintiff was held not bound by a condition limiting liability contained in a printed receipt handed him by the agent of a baggage express company in exchange for plaintiff's baggage checks, Andrews, J., said: "When a contract is required to be in writing, and a party receives a paper as a contract, or when he knows, or has reason to suppose, that a paper delivered to him contains the terms of a special contract, he is bound to acquaint himself with its contents; and, if he accepts and retains it, he will be bound by it, although he did not read it. But this rule cannot, for the reasons stated, be applied to this case; and the court properly refused to charge, as matter of law, that the delivery of the receipt created a contract for the carriage of the trunk, under its terms. The question whether, in a particular case, a party receiving such a receipt accepted it with notice of its contents, is one of evidence, to be determined by the jury. The fact of notice may be proved by direct or circumstantial evidence." Metal baggage checks fall within the same principle. "We may well conclude that a passenger receiving a metal check for his baggage, marked with its destination and the number, would be 'nonsupposing' <sup>597</sup> of the release of the carrier's liability stamped upon the other side." <sup>598</sup>

<sup>593</sup> *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647.

<sup>594</sup> *Rawson v. Railroad Co.*, *supra*.

<sup>595</sup> *Blossom v. Dodd*, 43 N. Y. 264.

<sup>596</sup> 73 N. Y. 329.

<sup>597</sup> Referring to a statement of Lord Ellenborough in *Kerr v. Willan*, 2 Starkie, 53, 54, where plaintiff's agent had testified that he had seen a board on which was painted a notice limiting liability, but "did not suppose" there was anything upon it, his lordship said: "You cannot make this notice to this nonsupposing person."

<sup>598</sup> *Indianapolis & C. R. Co. v. Cox*, 29 Ind. 360; 2 Greenl. Ev. § 215. "A distinction is to be drawn between such notices as can be strictly said to limit his liability, by relieving him from the strict common-law liability for losses against which carriers are understood to be insurers, and notices which

94. Notices of reasonable regulations, and notices whose object is to obtain from the shipper information which the carrier has a right to require, are binding, when brought home to the shipper, even without his assent.

"It is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him of any reasonable requirement to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum unless they are entered as such, and paid for accordingly." These are but the reasonable regulations which every man should be allowed to establish for his business, to insure regularity and promptness, and to properly inform him of the responsibility he assumes.<sup>599</sup> Assent of the shipper to the terms of this class of notices is unnecessary. He is bound by them without assent. This doctrine rests upon the right of the carrier to graduate his charges according to the value of the goods and the risk involved,<sup>600</sup> and upon the fraud involved in withholding from him information necessary to determine the amount of compensation reasonably due, and the degree of care and diligence to be exercised in the carriage.<sup>601</sup> "This would not

warn the public that his business is confined to the carriage of only a particular class of goods, or within the limits of his own route, or to those not above a specified value, without a compliance on the part of those who employ him with certain conditions. Such notices as these last are not to be considered so much in the light of notices to restrict his liability as in the nature of means to prevent fraud and imposition upon him; and, when they are reasonable, and fairly resorted to, no reason is to be found, in law, morals, or in public policy, why they should not be allowed to protect him against imposition." Hutch. Carr. (2d Ed.) § 244.

<sup>599</sup> *McMillan v. Railroad Co.*, 16 Mich. 79, 110.

<sup>600</sup> *Gibbon v. Paynton*, 4 Burrows, 2298 (per Lord Mansfield, and Aston, J.); *Tyly v. Morrice*, Carth. 485 (per Holt, C. J.); *Southern Exp. Co. v. Newby*, 36 Ga. 635; *Batson v. Donovan*, 4 Barn. & Ald. 21.

<sup>601</sup> *Orange County Bank v. Brown*, 9 Wend. 85, 115. See, also, *Fish v. Chapman*, 2 Ga. 349; *Cole v. Goodwin*, 19 Wend. 251; *Judson v. Railroad Corp.*, 6

seem to be any infringement upon the principle of the ancient rule. He must have a right to know what it is that he undertakes to carry, and the amount and extent of his risk. We can see nothing that ought to prevent him from requiring notice of the value of the commodity delivered to him, when, from its nature, or the shape and condition in which he receives it, he may need the information; nor why he should not insist on being paid in proportion to the value of the goods, and the consequent amount of his risk."<sup>602</sup> It has been seen that if the shipper does nothing to mislead the carrier, and the latter makes no inquiries, the shipper is not bound to state the character or value of the goods.<sup>603</sup> But, if the carrier inquires, the shipper must answer truly. The effect of notices of this class is to do away with the necessity for a special inquiry in each case.<sup>604</sup> "If he has given general notice," says Nelson, J., in *Orange County Bank v. Brown*,<sup>605</sup> "that he will not be liable, over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance paid, such notice, if brought home to the knowledge of the owner, is as effectual in qualifying the acceptance of the goods as a special agreement; and the owner, at his peril, must disclose the value and pay the premium. The carrier, in such case, is not bound to make the inquiry; and if the owner omits to make known the value, and does not, therefore, pay the premium at the time of delivery, it is considered as dealing unfairly with the carrier, and he is liable only to the amount mentioned in his notice, or not at all, according to the terms of his notice."

Notices of reasonable regulations, and the like, which are valid without assent, and notices limiting liability, which are not valid

Allen, 486; *Magnin v. Dinsmore*, 62 N. Y. 35; *Hopkins v. Westcott*, 6 Blatchf. 64, Fed. Cas. No. 6692; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 186. Where the effect of failure to inform the bailee of the contents of sealed packages is to prevent him from exercising the care he would otherwise have given, the bailee is liable only for positive misfeasance. *Gibbon v. Paynton*, 4 Burrows, 2298.

<sup>602</sup> *Moses v. Railroad Co.*, 24 N. H. 71, 91.

<sup>603</sup> See ante, p. 366.

<sup>604</sup> *Batson v. Donovan*, 4 Barn. & Ald. 21, 28.

<sup>605</sup> 9 Wend. 85, 114.

without assent, are severable; and, though contained in the same paper, one may be rejected and the other enforced.<sup>606</sup>

### SAME—TERMINATION OF LIABILITY AS COMMON CARRIER.

95. A common carrier's exceptional liability terminates when the carriage is completed according to the terms of the contract. This will be considered under the following heads:

- (a) Delivery to consignee (p. 448).
- (b) Delivery to a connecting carrier (p. 463).
- (c) Excuses for nondelivery (p. 477).

A common carrier's liability, as such, for goods which are carried, continues until the duty which has been undertaken is fully performed.<sup>607</sup> This usually occurs when the possession of the goods is parted with according to the terms of the contract of carriage,<sup>608</sup> but the carrier's exceptional liability may come to an end while possession of the goods is retained, and the carrier

<sup>606</sup> *Oppenheimer v. Express Co.*, 69 Ill. 62; *Moses v. Railroad*, 24 N. H. 71; *The Majestic*, 9 C. C. A. 161, 60 Fed. 624.

<sup>607</sup> Carrier's responsibility ceases when transit of goods is ended, and delivery is completed or waived by owner. *Stone v. Waitt*, 31 Me. 409; *De Mott v. Laraway*, 14 Wend. 225; *Michigan Southern & N. I. R. Co. v. Day*, 20 Ill. 375; *Western Transp. Co. v. Newhall*, 24 Ill. 466.

<sup>608</sup> Carrier must obey instructions of owner or shipper of goods as to their delivery. *Michigan Southern & N. I. R. Co. v. Day*, 21 Ill. 375. Carrier's risk ends if the consignee assumes control of the goods before they have arrived at place of delivery. *Stone v. Waitt*, 31 Me. 409. Carrier's liability cannot end until that of owner, consignee, or warehouseman begins *Chicago & R. I. R. Co. v. Warren*, 16 Ill. 502. Carrier, by assuming relation of warehouseman as to goods in his charge, is bound only to use ordinary care and diligence in keeping them safely. *Blumenthal v. Brainerd*, 38 Vt. 402. Failure of carrier to deliver goods at usual place of delivery, and attempt to deliver them at new, unusual, and ill-suited place, resulting in loss of goods, makes carrier responsible therefor, on ground of failure to deliver according to contract. *Benbow v. North Carolina R. Co.*, Phil. (N. C.) 421.



be liable only as a warehouseman. The different ways in which liability may be terminated, and the time at which the carrier's duty is fully performed, will now be considered in detail.

**96. DELIVERY TO CONSIGNEE**—A common carrier's exceptional liability is terminated:

- (a) By a personal delivery to the consignee, when the contract or the custom in the particular kind of carriage requires it (p. 448).
- (b) By notice of arrival to the consignee, and reasonable opportunity to remove the goods. This is the rule for carriers by water, and, in some states, for railroad companies (p. 452).
- (c) By arrival, ready for delivery, at the usual depot of the railroad company, in most states (p. 459).
- (d) As to baggage, by the lapse of a reasonable time for its removal after it is ready for delivery (p. 469).

*Personal Delivery to Consignee.*

A carrier may, by express contract, agree to make a personal delivery of the goods carried, to the consignee.<sup>609</sup> A like contract may be implied from the custom of the particular kind of carriage.<sup>610</sup> The question of custom, however, seldom arises, at the present day, because the duty of the different kinds of carriers to make a personal delivery has been settled by adjudications which make the duty a matter of law, rather than of custom.

At an early day, when all goods were carried upon land, in wagons, it was the duty of the carrier to deliver the goods to the

<sup>609</sup> *Hyde v. Navigation Co.*, 5 Term R. 389.

<sup>610</sup> *Gibson v. Culver*, 17 Wend. 305; *Schroeder v. Railroad Co.*, 5 Duer. (N. Y.) 55; *Fisk v. Newton*, 1 Denio (N. Y.) 45; *Van Santvoord v. St. John*, 6 Hill (N. Y.) 157; *Loveland v. Burke*, 120 Mass. 139, 142; *Eagle v. White*, 6 Whart. (Pa.) 505, 517; *Hemphill v. Chenie*, 6 Watts & S. (Pa.) 62; *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 186; *Huston v. Peters*, 1 Metc. (Ky.) 558; *Bartlett v. The Philadelphia*, 32 Mo. 256; *Duff v. Budd*, 3 Brod. & B. 177; *Birkett v. Willan*, 2 Barn. & Ald. 356; *Hyde v. Navigation Co.*, 5 Term R. 389.

consignee personally, or at his place of residence or business. This was so because the carrier could go anywhere with his wagons and make the delivery.<sup>611</sup> For this kind of carriers the requirements of delivery are the same now.<sup>612</sup> This rule, however, has not necessarily been extended to the proprietors of stagecoach lines, if they can show a custom to leave the goods at their stage houses, or at the inns where the coaches stop, instead of making a personal delivery. Carriers by water are not required to make a personal delivery.\* Their mode of transportation makes such a delivery impracticable.<sup>613</sup> The same is true of railroad companies. Their cars cannot leave the rails, and so personal delivery is impossible without the employment of some additional means of transportation at the several stations. Therefore railroad companies are not bound to make a personal delivery.<sup>614</sup> But a personal delivery to the consignee is a part of the duty of an express company. This is true as to all the larger places at which an express company carries on its business.<sup>615</sup> But at small way stations, where the volume of business will not justify the company in keeping a special delivery agent, it may show a custom

<sup>611</sup> *Fenner v. Railroad Co.*, 44 N. Y. 505.

<sup>612</sup> *Fisk v. Newton*, 1 Denio (N. Y.) 45; *Gibson v. Culver*, 17 Wend. (N. Y.) 305; *Storr v. Crowley*, 1 McClell. & Y. 129; *Hemphill v. Chenie*, 6 Watts & S. (Pa.) 62; *Eagle v. White*, 6 Whart. (Pa.) 505; *Barsemer v. Railway Co.*, 25 Ind. 434.

\**Gibson v. Culver*, 17 Wend. 305.

<sup>613</sup> *Cope v. Cordova*, 1 Rawle (Pa.) 203; *Union Steamboat Co. v. Napp*, 73 Ill. 506; *Chickering v. Fowler*, 4 Pick. (Mass.) 371.

<sup>614</sup> *Hutch. Carr.* (2d Ed.) § 367; *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284; *Thomas v. Railroad Corp.*, 10 Mete. (Mass.) 472; *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray, 263; *Fenner v. Railroad Co.*, 44 N. Y. 505. So a transportation company engaged in carrying freight over railroads not owned by it is not bound to make a personal delivery. *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284.

<sup>615</sup> *Baldwin v. Express Co.*, 23 Ill. 197; *American Merchants' Union Exp. Co. v. Schier*, 55 Ill. 140; *American Merchants' Union Exp. Co. v. Wolf*, 79 Ill. 430; *Witbeck v. Holland*, 45 N. Y. 13; *American Union Exp. Co. v. Robinson*, 72 Pa. St. 274; *Union Exp. Co. v. Ohleman*, 92 Pa. St. 323; *Marshall v. Express Co.*, 7 Wis. 1; *Southern Exp. Co. v. Armstead*, 50 Ala. 350; *Sullivan v. Thompson*, 99 Mass. 259; *Bennett v. Express Co.*, 12 Or. 49, 6 Pac. 160.

not to make a personal delivery to the consignee, but to send him prompt notice of the arrival of the goods.<sup>616</sup>

When personal delivery is necessary, it must be made at a reasonable time,<sup>617</sup> and to the consignee himself, or to some one having authority to receive the goods for the consignee.<sup>618</sup> So the delivery must be at the consignee's office or residence.<sup>619</sup> A delivery at the foot of the stairs, when the consignee's office was in the fourth story, has been held insufficient.<sup>620</sup> If personal delivery to the consignee is tendered, and he refuses to accept, or fails to pay the proper charges on, the goods, the carrier has performed his duty, and his exceptional liability is at an end.<sup>621</sup> The carrier may store the goods for the owner.<sup>622</sup> So, when the consignee is dead, or cannot be found after a reasonable endeavor to do so, the carrier is no longer responsible for the goods as a carrier.<sup>623</sup> But, if the carrier knows that the goods are the property of the consignor, the latter must be notified of their nondelivery.<sup>624</sup> When, however, the carrier is not informed that the

<sup>616</sup> *Baldwin v. Express Co.*, 23 Ill. 197; *Gulliver v. Express Co.*, 38 Ill. 503. It has been held that the consignor must have known of the usage when he shipped the goods, or he is not bound by it. *Packard v. Earle*, 113 Mass. 280.

<sup>617</sup> *Marshall v. Express Co.*, 7 Wis. 1; *Merwin v. Butler*, 17 Conn. 138. Delivery to the teller of a bank after banking hours has been held a good delivery, where a custom was shown to receive express packages at such time. *Marshall v. Express Co.*, *supra*. If the carrier tenders them at consignee's store after business hours, when store is closed and hands have gone away, consignee may refuse to receive them, and carrier will remain liable as carrier. *Hill v. Humphreys*, 5 Watts & S. 123.

<sup>618</sup> *Southern Exp. Co. v. Everett*, 37 Ga. 688; *Sullivan v. Thompson*, 99 Mass. 259.

<sup>619</sup> *Gibson v. Culver*, 17 Wend. 305; *Fisk v. Newton*, 1 Denio (N. Y.) 45; *Duff v. Budd*, 3 Broad & B. 177; *Storr v. Crowley*, 1 McClel. & Y. 129; *Hyde v. Navigation Co.*, 5 Term R. 389.

<sup>620</sup> *Haslam v. Adams Exp. Co.*, 6 Bosw. (N. Y.) 235.

<sup>621</sup> See *Storr v. Crowley*, 1 McClel. & Y. 129.

<sup>622</sup> *Schouler*, Bailm. 513. Cf. *Hawkins v. The Hattie Palmer*, 63 Fed. 1015.

<sup>623</sup> *Adams Exp. Co. v. Darnell*, 31 Ind. 20; *Marshall v. Express Co.*, 7 Wis. 1; *Clendaniel v. Tuckerman*, 17 Barb. 184; *Roth v. Railroad Co.*, 34 N. Y. 548; *Alabama & Tennessee R. R. Co. v. Kidd*, 35 Ala. 209; *Hasse v. Express Co.*, 94 Mich. 133, 53 N. W. 918.

<sup>624</sup> *American Merchants' Union Exp. Co. v. Wolf*, 79 Ill. 430; *Stephenson v. Hart*, 4 Bing. 476, 484.

consignor is owner, there is no duty to give such notice.<sup>625</sup> Mr. Hutchinson,<sup>626</sup> however, thinks the better rule would be that the consignor should be presumed to be the owner when the consignee refuses to receive the goods.<sup>627</sup>

*Delivery of C. O. D. Goods.*

When goods are received by a carrier for transportation C. O. D., the contract of the carrier in connection therewith is not only for the safe carriage and delivery of the goods to the consignee, but there is a further agreement to "collect on delivery," and return to the consignor the amount so received.<sup>628</sup> The common law places no obligation on a common carrier to do C. O. D. business. Such obligations are assumed only by contract.<sup>629</sup> Such a contract may, however, be implied from a previous course of dealing between the parties.<sup>630</sup> A contract of this kind may readily be implied when an express company receives goods marked "C. O. D.,"<sup>631</sup> but not by the receipt of goods so marked, by a carrier not usually doing a C. O. D. business.<sup>632</sup> When a carrier has undertaken the carriage of goods C. O. D. they must be delivered in accordance with the instructions of the consignor.<sup>633</sup> The con-

<sup>625</sup> *Kremer v. Express Co.*, 6 Coldw. (Tenn.) 356; *Fisk v. Newton*, 1 Denb. (N. Y.) 45; *Weed v. Barney*, 45 N. Y. 344; *Neal v. Railroad Co.*, 8 Jones, Law, 482.

<sup>626</sup> *Carriers* (2d Ed.) § 384.

<sup>627</sup> In case of refusal of the consignee to accept perishable goods, it may be the carrier's duty to sell them for the owner's account, in order to make the loss as light as possible, and he has implied authority to do so. *Arthur v. The Cassius*, 2 Story, 81, Fed. Cas. No. 564; *Rankin v. Packet Co.*, 9 Helsk. 564.

<sup>628</sup> *United States Exp. Co. v. Keefer*, 59 Ind. 263. As to the liability of the carrier for the safe return of the money, see ante, p. 310, note 40.

<sup>629</sup> *American Exp. Co. v. Lesem*, 39 Ill. 313; *Chicago & N. R. Co. v. Merrill*, 48 Ill. 425. If a carrier holds himself out as doing a C. O. D. business, "he might be obliged to accept goods upon such terms from all who offered them." *Hutch. Carr.* (2d Ed.) § 389.

<sup>630</sup> *American Exp. Co. v. Lesem*, 39 Ill. 313.

<sup>631</sup> *American Exp. Co. v. Lesem*, 39 Ill. 313.

<sup>632</sup> *Chicago & N. R. Co. v. Merrill*, 48 Ill. 425; *Union Railroad & Transp. Co. v. Riegel*, 73 Pa. St. 72.

<sup>633</sup> *Murray v. Warner*, 55 N. H. 546; *Meyer v. Lemcke*, 31 Ind. 208; *Feiber*

signee may be given an opportunity to inspect the goods,<sup>634</sup> and a reasonable time to pay the charges.<sup>635</sup> If the goods are refused when a delivery is tendered, the carrier's liability as an insurer is at an end, and the carrier, from that time, holds the goods as a warehouseman.<sup>636</sup>

*Notice of Arrival—Carriers by Water.*

As already stated, a common carrier by water of goods consigned to one not the owner thereof is not bound to deliver the goods to the consignee thereof in person, nor at his warehouse.<sup>637</sup> He may land them at a wharf at the port of destination.<sup>638</sup> In the absence of a provision in the contract of carriage as to where the delivery shall be made,<sup>639</sup> the carrier is to deliver at the usual wharf.<sup>640</sup> In the absence of a usage to the contrary, if the carrier has no wharf at the port of delivery,<sup>641</sup> the consignee may require delivery at any convenient wharf.

Where there is but one consignee, or where the consignees are unanimous, as between two points within the port equally convenient for the carrier, he must deliver at that most convenient for the consignee, if seasonably asked to do so.<sup>642</sup> It would be for the

v. Telegraph Co. (Com. Pl.) 3 N. Y. Supp. 116; *Libby v. Ingalls*, 124 Mass. 503. The consignor may, however, ratify a delivery not in accordance with his instructions. *Rathbun v. Steamboat Co.*, 76 N. Y. 376.

<sup>634</sup> *Lyons v. Hill*, 46 N. H. 49. And see *Herrick v. Gallagher*, 60 Barb. 566.

<sup>635</sup> *Great Western Ry. v. Crouch*, 3 Hurl. & N. 183.

<sup>636</sup> *Weed v. Barney*, 45 N. Y. 344; *Gibson v. Express Co.*, 1 Hun, 387.

<sup>637</sup> *Richardson v. Goddard*, 23 How. 28.

<sup>638</sup> *Chickering v. Fowler*, 4 Pick. 371.

<sup>639</sup> *Johnston v. Davis*, 60 Mich. 56, 26 N. W. 830.

<sup>640</sup> *Richmond v. Steamboat Co.*, 87 N. Y. 240; *The Boston*, 1 Low. 464, Fed. Cas. No. 1,671; *The E. H. Fittler*, 1 Low. 114, Fed. Cas. No. 4,311; *Montgomery v. The Port Adelaide*, 38 Fed. 753; *Devato v. 823 Barrels of Plumbago*, 20 Fed. 510; *Gatliffe v. Bourne*, 4 Bing. N. C. 314; *Salmon Falls Manuf'g Co. v. The Tangier*, 1 Cliff. 396, Fed. Cas. No. 12,266.

<sup>641</sup> If the carrier has a wharf, it is the proper place for delivery. *Dixon v. Dunham*, 14 Ill. 324. But see *Arnold v. Steamship Co.*, 29 Fed. 184.

<sup>642</sup> *Richmond v. Steamboat Co.*, 87 N. Y. 240; *Dixon v. Dunham*, 14 Ill. 324; *The Sultana v. Chapman*, 5 Wis. 454; *The E. H. Fittler*, 1 Low. 114, Fed. Cas. No. 4,311; *O'Rourke v. 221 Tons of Coal*, 1 Fed. 619; *Teilman v. Plock*, 21 Fed. 349; *The Mascotte*, 2 C. C. A. 400, 51 Fed. 606.



carrier to show a usage to the contrary, and then to establish its reasonableness. In the case of one consignee of the whole cargo, having his place of business at the port, and readily accessible, it is worthy of serious consideration whether the master must not consult with him at all events.<sup>643</sup>

Where there are several consignees, the case is different. The master cannot conveniently consult them, and is not bound to do so. In such cases the rule is that the majority—that is, those who together pay more than half the freight—have the right to choose the wharf. This is reasonable, because it is of no special moment to the minority whether the master or the majority choose a suitable wharf, and it is as convenient and just a mode of ascertaining the majority as any other. But the choice must be made known to the master before he has himself come under liabilities to the wharfinger of a wharf chosen by himself.<sup>644</sup>

The carrier has no right to require the consignee to remove goods on Sunday, or on a legal holiday on which labor is forbidden.<sup>645</sup> And before removal by the consignee is required the goods must be placed by the carrier in a situation suitable for inspection and removal. Until this is done the carrier's liability continues as an insurer.<sup>646</sup>

The duty of the consignee to receive and take the goods is as imperative as the duty of the carrier to deliver. Both obligations are to be reasonably construed, having reference to the circumstances. The stringent liability of the carrier cannot be con-

<sup>643</sup> The *E. H. Fittler*, *supra*.

<sup>644</sup> The *E. H. Fittler*, *supra*; *The Boston*, 1 Low, 464, Fed. Cas. No. 1,671; *Devato v. 823 Barrels of Plumbago*, 20 Fed. 510.

<sup>645</sup> *Richardson v. Goddard*, 23 How. 28; *Gates v. Ryan*, 37 Fed. 154. See, as to the Fourth of July, *Russell Manuf'g Co. v. New Haven Steamboat Co.*, 50 N. Y. 121; *Scheu v. Benedict*, 116 N. Y. 510, 22 N. E. 1073.

<sup>646</sup> *The Eddy*, 5 Wall. 481; *The Ben Adams*, 2 Ben. 445, Fed. Cas. No. 1,289; *Goodwin v. Railroad Co.*, 58 Barb. 195. Where the owner of a vessel agrees, for a single price, to transport a cargo from one port to another, and allow storage thereof in the vessel during the winter following the voyage, his liability as carrier ceased on arrival at port of destination, and he is thereafter liable as a warehouseman only. *Norton v. The Richard Winslow*, 67 Fed. 259.

tinued at the option, or to suit the convenience, of the consignee. The consignee is bound to act promptly in taking the goods, and if he fails to do so, whatever other duty may rest upon the carrier in respect to the goods, his liability as insurer is, by such failure, terminated.<sup>648</sup> If the consignee is present, the goods may be tendered or delivered to him personally, and he is bound to remove them within a reasonable time. If he is not present, he is entitled to reasonable notice from the carrier of their arrival, and a fair opportunity to take care of and remove them.<sup>649</sup> If the consignee is unknown to the carrier, the latter must use proper and reasonable diligence to find him; and if, after the exercise of such diligence, the consignee cannot be found, the goods may be stored in a proper place, and the carrier will have performed his whole duty, and will be discharged from liability as a carrier. But, for want of diligence in finding the consignee and giving notice of the arrival of the goods, the carrier is liable for the damages resulting from a delay in the receipt of the goods by the consignee occasioned by such want of diligence.<sup>650</sup> When the consignee is unknown to the carrier, a due effort to find him is a condition precedent to a right to warehouse the goods, and, as notice to the consignee, takes the place of a personal delivery of the goods; and, as a due and unsuccessful effort to find the consignee will alone excuse the want of such notice, it follows that, if a reasonable and diligent effort is not made to find the consignee, the carrier is liable for the consequence of the neglect. What is a due and a reasonable effort, and what is proper and reasonable diligence, depend necessarily very much upon the cir-

<sup>648</sup> *Redmond v. Steamboat Co.*, 46 N. Y. 578; *Hedges v. Railroad Co.*, 49 N. Y. 223; *Liverpool & Great Western Steam Co. v. Sutter*, 17 Fed. 695; *De Grau v. Wilson*, Id. 698.

<sup>649</sup> *Ostrander v. Brown*, 15 Johns. 39; *Zinn v. Steamboat Co.*, 49 N. Y. 442; *Price v. Powell*, 3 N. Y. 322; *Russell Manuf'g Co. v. New Haven Steamboat Co.*, 50 N. Y. 121; *McAndrew v. Whitlock*, 52 N. Y. 40; *Gleadell v. Thomson*, 56 N. Y. 194; *Crawford v. Clark*, 15 Ill. 561; *Salmon Falls Manuf'g Co. v. The Tangier*, 1 Cliff. 396, Fed. Cas. No. 12,266. This notice must be actual. Publication in newspapers has been held insufficient. *Kohn v. Packard*, 3 La. 224; *Segura v. Reed*, 3 La. Ann. 695.

<sup>650</sup> *Zinn v. Steamboat Co.*, 49 N. Y. 442; *Sherman v. Railroad Co.*, 64 N. Y. 254; *Union Steamboat Co. v. Knapp*, 73 Ill. 506.

circumstances of each case, and, in the nature of things, is a question of fact, for the jury, and not of law, for the court.<sup>651</sup>

An officer of the customhouse, on board a ship in the discharge of his official duty to care for the lawful unloading of the cargo, is not, as such, authorized to receive the goods, and a discharge with his knowledge and assent is not such a delivery as relieves the carrier from liability.<sup>652</sup>

Reasonable notice and reasonable time are such as give the consignee time enough, under all proper and ordinary circumstances, and proceeding in the ordinary mode of those engaged in the same business, to provide for the care and removal of the goods. And, where the carrier is apprised of the distance the goods are to be carted after delivery, such distance is proper to be considered in determining the question as to what is reasonable. There is no difference, in the obligation as to delivery, between a carrier by sea and a carrier by inland water.<sup>653</sup> However, the necessity of giving notice may be waived by a custom of the parties, as where the consignee is accustomed to send a cartman to the wharf each day for any goods which may arrive.<sup>654</sup> Or the carrier may show a usage in the particular kind of carriage which dispenses with notice.<sup>655</sup> Notice to the consignee may, of course, be waived by contract.<sup>656</sup> Such usage or contract will not relieve the carrier from losses caused by his negligence.<sup>657</sup>

<sup>651</sup> *Zinn v. Steamboat Co.*, 49 N. Y. 442.

<sup>652</sup> *McAndrew v. Whitlock*, 52 N. Y. 40.

<sup>653</sup> *Id.*

<sup>654</sup> *Russell Manuf'g Co. v. Steamboat Co.*, 50 N. Y. 121; *Ely v. Steamboat Co.*, 53 Barb. 207. But notice to consignee of arrival of goods will not be excused by fact that custom of delivering goods to public draymen prevails at port of arrival. *Dean v. Vaccaro*, 2 Head (Tenn.) 488.

<sup>655</sup> *Gibson v. Culver*, 17 Wend. 305; *McMasters v. Railroad Co.*, 69 Pa. St. 374; *Dixon v. Dunham*, 14 Ill. 324; *Crawford v. Clark*, 15 Ill. 561; *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 16 Vt. 52, 23 Vt. 186; *Slende v. Payne*, 14 La. Ann. 457; *Stone v. Rice*, 58 Ala. 95; *Gatliffe v. Bourne*, 4 Bing. N. C. 314, 329; *Garside v. Navigation Co.*, 4 Term R. 581. This usage need not be shown to have been known to the shipper, as he is presumed to contract with reference to all the usages of the particular trade. *Van Santvoord v. St. John*, 6 Hill (N. Y.) 157, 167.

<sup>656</sup> *The Boskenna Bay*, 40 Fed. 91; *Henshaw v. Rowland*, 51 N. Y. 242.

<sup>657</sup> *The Surrey*, 26 Fed. 791; *The Spartan*, 25 Fed. 44, 56; *New Jersey*

Although a consignee may neglect to accept or receive the goods, the carrier is not thereby justified in abandoning them, or in negligently exposing them to injury.<sup>658</sup> The law enables him to wholly exempt himself from responsibility in such a contingency, by giving him the right to warehouse the goods. When this is done, he is no longer liable in any respect, and if they are subsequently lost by the negligence of the warehouseman the carrier is not liable.<sup>659</sup> But so long as he has the custody of the goods, although there has been a constructive delivery which exempts him from liability as carrier, there supervenes upon the original contract of carriage, by implication of law, a duty, as bailee or warehouseman, to take ordinary care of the property.<sup>660</sup>

*Same—Railroad Companies—New Hampshire Rule.*

In some states, but not the greater number, the rule as to delivery by a railroad company is the same as for a carrier by water. The leading case holding this rule is *Moses v. Railroad Co.*<sup>661</sup> In

*Steam Nav. Co. v. Merchants' Bank of Boston*, 6 How. 344; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Mynard v. Railroad Co.*, 71 N. Y. 180; *The Hadji*, 20 Fed. 875.

<sup>658</sup> *Hermann v. Goodrich*, 21 Wis. 543; *Merwin v. Butler*, 17 Conn. 138; *Chickering v. Fowler*, 4 Pick. (Mass.) 371; *Dean v. Vaccaro*, 2 Head (Tenn.) 488; *Shenk v. Steam Propeller Co.*, 60 Pa. St. 109; *Northern v. Williams*, 6 La. Ann. 578; *Segura v. Reed*, 3 La. Ann. 695; *Tarbell v. Shipping Co.*, 110 N. Y. 170, 17 N. E. 721; *Redmond v. Steamboat Co.*, 46 N. Y. 578; *McAndrew v. Whitlock*, 52 N. Y. 40; *The City of Lincoln*, 25 Fed. 835, 839; *Richardson v. Goddard*, 23 How. 28, 39; *The Grafton*, 1 Blatchf. 173, Fed. Cas. No. 5,655. Where consignee is unable, or refuses, to accept goods, carrier must secure them in place of safety, and will not be justified in leaving them exposed on wharf. *Ostrander v. Brown*, 15 Johns. 39.

<sup>659</sup> *Redmond v. Steamboat Co.*, 46 N. Y. 578.

<sup>660</sup> *Tarbell v. Shipping Co.*, 110 N. Y. 170, 17 N. E. 721.

<sup>661</sup> 32 N. H. 523. This rule has been followed in the following cases: *Anniston & A. R. Co. v. Ledbetter*, 92 Ala. 326, 9 South. 73; *Columbus & W. Ry. Co. v. Ludden*, 89 Ala. 612, 7 South. 471; *Louisville & N. R. Co. v. Oden*, 80 Ala. 38; *Missouri Pac. Ry. Co. v. Nevill*, 60 Ark. 375, 30 S. W. 425; *Missouri Pac. Ry. Co. v. Wichita Wholesale Grocery Co.* (Kan. Sup.) 40 Pac. 899; *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333 (and see *Union Pac. R. Co. v. Moyer*, 40 Kan. 184, 19 Pac. 639); *Jeffersonville R. Co. v. Cleveland*, 2 Bush (Ky.) 468; *Maignan v. Railroad Co.*, 24 La. Ann. 333; *Buckley v. Railway Co.*, 18 Mich. 121; *Feige v. Railroad Co.*, 62 Mich. 1, 28 N. W. 685; *Piney v. Railroad Co.*, 19 Minn. 251 (Gil. 211); *Derosia v. Railroad Co.*, 18

this case it was said that the railroad companies' responsibility as common carriers for the goods in their charge "ceases only when they have reached their destination, and their control over them as carriers has terminated. That control must continue until delivery, or a tender or offer to deliver, or some other act which the law can regard as equivalent to a delivery. The delivery of goods conveyed by railroad is necessarily confined to certain points on the line of the railroad track. Railroad companies cannot, like wagoners, pass from warehouse to warehouse, and there discharge their freight to the various consignees, upon their own premises. They consequently establish certain points as places of delivery, and there unlade their cars of such of the freight as may most conveniently find its ultimate destination from those respective points. But while it is in the process of unloading, and afterwards, while awaiting removal, it must be protected from the weather and from depredation. Freight is brought over the road at all hours, by night as well as by day, and the trains must necessarily be more or less irregular in the hours of their arrival. It cannot be required of the consignee to attend at the precise moment when his goods arrive, to receive and take care of them, and the company cannot discharge themselves from responsibility by leaving them in an exposed condition in the open air." Under

Minn. 133 (Gil. 119); *Kirk v. Railway Co.* (Minn.) 60 N. W. 1084; *Mills v. Railroad Co.*, 45 N. Y. 622; *Hedges v. Railroad Co.*, 49 N. Y. 223; *Rawson v. Holland*, 59 N. Y. 611; *McKinney v. Jewett*, 90 N. Y. 267; *McDonald v. Railroad Co.*, 34 N. Y. 497; *Fenner v. Railroad Co.*, 44 N. Y. 505; *Sprague v. Railroad Co.*, 52 N. Y. 637; *Faulkner v. Hart*, 82 N. Y. 413; *Pelton v. Railroad Co.*, 54 N. Y. 214; *Tarbell v. Shipping Co.*, 110 N. Y. 170, 17 N. E. 721; *Lake Erie & W. R. Co. v. Hatch* (Ohio Sup.) 39 N. E. 1042; *Gaines v. Insurance Co.*, 28 Ohio St. 418; *Hirsch v. The Quaker City*, 2 Disn. (Ohio) 144; *Lake Erie & W. R. Co. v. Hatch*, 6 Ohio Cir. Ct. 230; *Ouimlt v. Henshaw*, 35 Vt. 604; *Blumenthal v. Brainerd*, 38 Vt. 402; *Winslow v. Railroad Co.*, 42 Vt. 700; *Wood v. Crocker*, 18 Wis. 345; *Parker v. Railway Co.*, 30 Wis. 680; *Lenke v. Railway Co.*, 39 Wis. 449; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318. This is also the rule in England. *Mitchell v. Railway Co.*, L. R. 10 Q. B. 256. In a number of states there are statutory provisions on the subject: Georgia, Code 1882, § 2070; Missouri, Rev. St. 1879, § 5280; California, Pol. Code, § 3155; Colorado, Gen. St. 1883, § 3435; Texas, Sayles' Civ. St. art. 281; Nevada, Gen. St. 1885, § 4964; Alabama, Code 1886, § 1183; Minnesota, Gen. St. 1894, § 2107. See 1 Stim. Am. St. Law, § 4352.



this rule the carrier must notify the consignee of the arrival of the goods, and allow a reasonable time for their removal.<sup>662</sup> The extent of the reasonable opportunity to be afforded the consignee for removal is not to be measured by any peculiar circumstances in his own condition and situation, rendering it necessary, for his own convenience and accommodation, that he should have longer time or better opportunity than if he resided in the vicinity of the warehouse, and was prepared with the means and facilities for taking the goods away.<sup>663</sup> If his particular circumstances require a more extended opportunity, the goods must be considered after such reasonable time as, but for those peculiar circumstances, would be deemed sufficient, to be kept by the company for his convenience, and under the responsibility of bailees for hire only.<sup>664</sup> Until the goods have passed out of the custody and control of the carrier into the hands of the proper person to receive them, they have a duty to perform, in the preservation and protection of the property, even after their responsibility as common carriers is at an end.<sup>665</sup> If the owner or consignee, or other person authorized to receive the goods, is present at the time of the arrival, and has opportunity to see that they have arrived, and to take them away,

<sup>662</sup> *Roth v. Railroad Co.*, 34 N. Y. 548; *Hedges v. Railroad Co.*, 49 N. Y. 223; *Lemke v. Railway Co.*, 39 Wis. 449. Where a piano, which could have been removed from the carrier's depot in about an hour, was shipped over a continuous line of railroad, and the distance from the place of shipment to the destination is such that the property might reasonably have been expected to arrive on the day of the shipment or the next day, and it is allowed to remain three days after its arrival, the carrier was held liable only as a warehouseman. *Columbus & W. Ry. Co. v. Ludden*, 89 Ala. 612, 7 South. 471. And see *Anniston & A. R. Co. v. Ledbetter*, 92 Ala. 326, 9 South. 73. Where the goods were ready for delivery on the 10th, but not called for till the 16th, it was held more than a reasonable time, and that liability as a common carrier had ceased. *Derosia v. Railroad Co.*, 18 Minn. 133 (Gil. 119). So eight days was held more than a reasonable time in *Railroad Co. v. Maris*, 16 Kan. 333.

<sup>663</sup> *Moses v. Railroad*, 32 N. H. 523; *Wood v. Crocker*, 18 Wis. 345; *Lemke v. Railway Co.*, 39 Wis. 449; *Derosia v. Railroad Co.*, 18 Minn. 133 (Gil. 119); *Pinney v. Railroad Co.*, 19 Minn. 251 (Gil. 211); *Railroad Co. v. Maris*, 16 Kan. 333.

<sup>664</sup> *Moses v. Railroad*, 32 N. H. 523; *Frank v. Railway Co.*, 57 Mo. App. 181.

<sup>665</sup> *Smith v. Railroad*, 7 Fost. (N. H.) 86.

this may be regarded as equivalent to a delivery. They must be understood, after this, to remain in the charge of the company as bailees for hire.<sup>666</sup> The carrier's liability is from that time that of a bailee for hire, and not a gratuitous bailee.<sup>667</sup> The carrier's duty towards goods left in its charge after the liability as a common carrier is at an end is that of a warehouseman, and the carrier may charge a reasonable amount for the storage of the goods.<sup>668</sup> The requirements as to delivery by a railroad company may be varied by contract or custom.<sup>669</sup>

*Arrival at Depot—Massachusetts Rule.*

In the greater number of states, the rule requiring notice to the consignee is repudiated, and it is held that the liability of a railroad company as a common carrier terminates, and its responsibility as a warehouseman commences, upon the arrival of the goods at the point of destination, and deposit there in the warehouse of the company, to await the convenience of the consignee, without notice of the arrival of the freight being given the consignee.<sup>670</sup> The leading case sup

<sup>666</sup> *Moses v. Railroad*, 32 N. H. 523.

<sup>667</sup> *Miller v. Mansfield*, 112 Mass. 260; *Barron v. Eldredge*, 100 Mass. 455; *Goold v. Chapin*, 20 N. Y. 259; *Weed v. Barney*, 45 N. Y. 344; *Tarbell v. Shipping Co.*, 110 N. Y. 170, 17 N. E. 721; *Brown v. Railway*, 51 N. H. 535; *Kennedy v. Railroad Co.*, 74 Ala. 430; *Alabama & T. R. R. Co. v. Kidd*, 35 Ala. 209; *Cairns v. Robins*, 8 Mees. & W. 258; *Mitchell v. Railway Co.*, L. R. 10 Q. B. 256.

<sup>668</sup> *White v. Humphery*, 11 Q. B. Div. 43; *Cairns v. Robins*, 8 Mees. & W. 258.

<sup>669</sup> *McMasters v. Railroad Co.*, 69 Pa. St. 374; *Dresbach v. Railroad Co.*, 57 Cal. 462; *South & N. A. R. Co. v. Wood*, 66 Ala. 167; *Louisville & N. R. Co. v. Gilmer*, 89 Ala. 534, 7 South. 654. Where the carrier and shipper, by special contract, stipulate for notice, without any limitations or conditions, the reasonable time for removal commences from the time of the notice, and not from that of the arrival of goods. *Railroad Co. v. Maris*, 16 Kan. 333.

<sup>670</sup> *Jackson v. Railway Co.*, 23 Cal. 268 (but see *Wilson v. Railroad Co.*, 91 Cal. 166, 29 Pac. 861); *Southwestern Railroad Co. v. Felder*, 46 Ga. 433; *Rome R. Co. v. Sullivan*, 14 Ga. 277, 282; *Porter v. Railroad Co.*, 20 Ill. 407; *Richards v. Railroad Co.*, 20 Ill. 404; *Chicago & A. R. Co. v. Scott*, 42 Ill. 132; *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284; *Rothschild v. Railroad Co.*, 69 Ill. 164; *Bansemmer v. Railway Co.*, 25 Ind. 434; *Cincinnati & Chicago Air Line R. Co. v. McCool*, 26 Ind. 140; *Pittsburgh, C. & St. L. Ry. Co. v. Nash*, 43 Ind. 423, 426; *Mohr v. Railroad Co.*, 40 Iowa, 579; *Francis v. Railroad Co.*, 25 Iowa, 60; *Independence Mills Co. v. Burlington, C. R. &*

porting this rule is *Norway Plains Co. v. Railroad Co.*<sup>671</sup> The decision was put upon the ground that from the necessary conditions of the business of railroad corporations, and from their practice to have platforms on which to place goods from the cars in the first instance, and warehouse accommodations by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be delivered, the whole duty assumed by the railroad corporation is to carry the goods safely to the place of destination, and there discharge them upon the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith, or, if he is not there, ready to take them, then to place them securely, and keep them a reasonable time, ready to be delivered when called for; that delivery from themselves as common carriers to themselves as keepers for hire discharges their responsibility as common carriers; that they are responsible as common carriers until the goods are removed from the cars and placed on the platform; that if, on account of their arrival in the night, or at any other time when, by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause they cannot then be delivered, or if for any reason the consignee is not there ready to receive them, it is the duty of the company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them; and for the performance of these duties, after the goods are delivered from the cars, the company are liable as warehousemen or keepers of goods for hire. In short, the railroad corporation ceases to be a common carrier, and becomes a warehouseman, as matter of law, when it has completed the duty of transportation, and assumed the position of warehouseman, as matter of fact and

*N. Ry. Co.*, 72 Iowa, 535, 34 N. W. 320; *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray, 263; *Rice v. Hart*, 118 Mass. 201; *Holtzclaw v. Duff*, 27 Mo. 392; *Gashweiler v. Railway Co.*, 83 Mo. 112; *Rankin v. Railroad Co.*, 55 Mo. 167; *Buddy v. Railway Co.*, 20 Mo. App. 206; *Pindell v. Railway Co.*, 34 Mo. 675, 683; *Neal v. Railroad Co.*, 8 Jones (N. C.) 482; *Morris & E. R. Co. v. Ayres*, 29 N. J. Law, 393; *McCarty v. Railroad Co.*, 30 Pa. St. 247; *Shenk v. Propeller Co.*, 60 Pa. St. 109.

<sup>671</sup> 1 Gray, 263.

according to the usages and necessities of the business in which it is engaged.<sup>672</sup> In cases where the consignee is to unload the car, the carrier's liability does not terminate by the mere arrival of the car at the station. It must first be put in a proper place for unloading.<sup>673</sup> Thus, it has been held that the liability of a railroad company as carrier of wheat in bulk does not cease until it has placed the car containing it in such a position at the place of destination that it can, with safety and a reasonable degree of convenience, be unloaded by the consignee. And if the car containing the wheat be left in a position where it cannot be conveniently unloaded, and while there is destroyed by fire, the company will be liable for the loss, although, as a physical fact, the car could have been unloaded in such position.<sup>674</sup> As already stated,<sup>675</sup> a railroad company is a common carrier of the cars of another company which it hauls over its tracks. The carrier's liability as such terminates with the delivery of the cars to the consignee, whether on the carrier's own track, or on the private track of the consignee.<sup>676</sup> If the cars are to be returned by the railroad company after they are unloaded, the liability may be said to be suspended while under the consignee's control. When the cars are delivered to the consignee on the switch track, they have reached their destination; and while the cars are under the control of the consignee the liability of the carrier is suspended, to again attach when the cars are ready for further transportation. In the interim—which might be for a shorter or longer period of time, as determined by a party over whom the carrier has no control, and for whose acts it is in no wise responsible—the carrier, although the cars are standing upon its switch tracks, has no such control as authorizes it to take the cars elsewhere for safety; and it is manifestly unjust, and in-

<sup>672</sup> *Rice v. Hart*, 118 Mass. 201.

<sup>673</sup> *Independence Mills Co. v. Burlington, C. R. & N. Ry. Co.*, 72 Iowa, 535, 34 N. W. 320; *East Tennessee, V. & G. R. Co. v. Hunt*, 15 Lea (Tenn.) 261.

<sup>674</sup> *Independence Mills Co. v. Burlington, C. R. & N. Ry. Co.*, *supra*.

<sup>675</sup> *Ante*, p. 312.

<sup>676</sup> *East St. Louis C. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 123 Ill. 594, 15 N. E. 45; *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. 59.

consistent with the reason for applying the rule, to hold it responsible during that time as an insurer.<sup>677</sup>

### *Baggage.*

The exceptional liability of a carrier of baggage is terminated when the owner has had a reasonable time to remove it after it has been unloaded by the carrier, and placed in a situation for delivery.<sup>678</sup> No notice to the owner of the arrival of the baggage has been held necessary in any state, since it arrives, in the ordinary course of transportation, on the same train as the owner. It is thus seen that the rule as to the termination of liability for baggage lies between the two conflicting rules as to freight. It differs from the New Hampshire rule in that no notice need be given, and from the Massachusetts rule in holding the carrier's liability as an insurer to continue after it has the baggage ready to deliver, until the owner has had a reasonable time to remove it. This time, however, is much less than is allowed under the New Hampshire rule for removing freight.<sup>679</sup> In fact, the passenger is required to take away his baggage almost immediately. Thus, it has been held in several cases that, when the train carrying the passenger and his baggage arrived at night, it was an unreasonable delay to permit it to remain until the next morning.<sup>680</sup> And, of course, any longer delay would relieve the carrier.<sup>681</sup> But, if the fault of the carrier has caused the delay, its liability is not ter-

<sup>677</sup> *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. 59.

<sup>678</sup> *Oulmit v. Henshaw*, 35 Vt. 604; *Hoeger v. Railway Co.*, 63 Wis. 100, 23 N. W. 435; *Patscheider v. Railway Co.*, 3 Exch. Div. 153.

<sup>679</sup> *Chicago & A. R. Co. v. Addizoat*, 17 Ill. App. 632; *Patscheider v. Railway Co.*, *supra*.

<sup>680</sup> *Jacobs v. Tutt*, 33 Fed. 412; *Louisville, C. & L. R. Co. v. Mahan*, 8 Bush (Ky.) 184; *Roth v. Railroad Co.*, 34 N. Y. 548; *Ross v. Railroad Co.*, 4 Mo. App. 582. The fact that the arrival is on Sunday, and there is a statute prohibiting travel on that day, will not excuse the delay. *Jones v. Transportation Co.*, 50 Barb. 193. Nor will the illness of the passenger. *Chicago, R. I. & P. R. Co. v. Boyce*, 73 Ill. 510.

<sup>681</sup> *Hoeger v. Railway Co.*, 63 Wis. 100, 23 N. W. 435; *Van Horn v. Kermit*, 4 E. D. Smith, 453; *Jones v. Transportation Co.*, 50 Barb. 193; *Burnell v. Railroad Co.*, 45 N. Y. 184; *Holdridge v. Railroad Co.*, 56 Barb. 191.



minated.<sup>682</sup> If the passenger has not removed his baggage within a reasonable time, the carrier is not relieved of all liability, but continues responsible as a warehouseman.<sup>683</sup>

*End, Jones Feb 1876*

**97. DELIVERY TO CONNECTING CARRIER** — Where goods are received to be transported over connecting lines, the first carrier is not liable for loss or injury occurring beyond its own line, unless, by special contract, he undertakes to convey the goods to their destination.

**EXCEPTION**—In England and a few American states the first carrier is liable unless, by special contract, his liability is limited to losses occurring on his own line.

The common-law obligations of a common carrier to a connecting line are the same, as to reception, transportation, and delivery of freight, as those existing between a carrier and an individual shipper.<sup>684</sup> The main questions in such cases are as to when the liability of the first carrier to the shipper terminates, and which of the connecting carriers is responsible for loss or damage to the goods carried.

<sup>682</sup> *Dinenny v. Railroad Co.*, 49 N. Y. 546; *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 34 Kan. 502, 9 Pac. 225; *Prickett v. New Orleans Anchor Line*, 13 Mo. App. 436. But see *Chicago & A. R. Co. v. Addizott*, 17 Ill. App. 632. Where a boat was delayed, and arrived in port during the night, it was held that the voyage was not ended until passengers who remained on board by the master's permission had had a reasonable time on the next morning to leave the boat and to remove their baggage, and that the carrier was liable to passengers so remaining on board for loss of baggage occasioned by the accidental burning of the vessel during the night. *Prickett v. New Orleans Anchor Line*, supra.

<sup>683</sup> *Burnell v. Railroad Co.*, 45 N. Y. 184; *Mattison v. Railroad Co.*, 57 N. Y. 552; *Fairfax v. Railroad Co.*, 67 N. Y. 11; *Chicago, R. I. & P. R. Co. v. Fairclough*, 52 Ill. 106; *Bartholomew v. Railroad Co.*, 53 Ill. 227; *Mote v. Railroad Co.*, 27 Iowa, 22; *Rome R. v. Wimberly*, 75 Ga. 316. As to what is a proper place to store the baggage, see *Hoeger v. Railway Co.*, 63 Wis. 100, 23 N. W. 435; *St. Louis & C. R. Co. v. Hardway*, 17 Ill. App. 331.

<sup>684</sup> *Shelbyville R. Co. v. Louisville, C. & L. R. Co.*, 82 Ky. 541.

*Who are Connecting Carriers.*

A connecting carrier is one whose route, not being the first one, lies somewhere between the point of shipment and the point of destination. It becomes such by virtue of the agreement between the consignor or shipper and the first carrier, whereby the latter undertakes to deliver the shipment at its ultimate destination, and thus makes the carrier beyond its own route its agent for continuing the transportation, or else undertakes only to deliver the goods safely to the next carrier on the route, who thus becomes the agent of the shipper for carrying them further.<sup>685</sup> Thus, a transfer company carrying the goods from the depot at the station of destination to the consignee's business house is not a connecting carrier.<sup>686</sup> Nor is a railroad company which hauls cars over its tracks from the last carrier's depot to the consignee's mill, at which delivery was required to be made by the bill of lading.<sup>687</sup>

*When Delivery to Connecting Carrier is Complete.*

When goods are received by a carrier to be transported to a point beyond its own line, under circumstances which, as will be seen in the succeeding paragraphs, make the carrier liable as an insurer only to the end of its own line, there is nevertheless superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line,—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line.<sup>688</sup> Until this duty is performed, the

<sup>685</sup> *Nanson v. Jacob*, 12 Mo. App. 125, 127.

<sup>686</sup> *Id.*

<sup>687</sup> *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 7 S. E. 916. But see *Missouri Pac. R. Co. v. Wichita Wholesale Grocery Co.* (Kan. Sup.) 40 Pac. 899.

<sup>688</sup> *Myrick v. Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. 425. If the first carrier disregards the shipper's orders, and forwards the goods by a different carrier, it is liable for any loss sustained by the shipper. *Isaacson v. Railroad Co.*, 94 N. Y. 278; *Johnson v. Railroad Co.*, 33 N. Y. 610; *Georgia R. Co. v. Cole*, 68 Ga. 623; *Langdon v. Robertson*, 13 Ont. 497. A common carrier who undertakes to transport goods over his own route, and then to forward them to a designated destination beyond, is bound to transmit, with their delivery to the carrier next en route, all special instructions received by him from the consignor, and, in default thereof, make good any loss resulting from

1. Initial carrier  
2. Connecting carrier or carriers  
Carriers

first carrier continues liable as an insurer. The delivery to the connecting carrier must be an actual delivery, or acts which are so far equivalent to a delivery as make the next line assume the relation of a carrier to the goods.<sup>680</sup> The first carrier does not, by unloading the goods at the end of its line, become a warehouseman.<sup>690</sup> The shipper delivers his goods to a carrier, who becomes

failure to do so. Marks or labels on the packages delivered will not supply the omission of such instructions from the accompanying shipping bills, where they are shown not to have come to the actual knowledge of the next succeeding carrier, or his agent, charged with the duty of receiving and forwarding such bills. *Little Miami R. Co. v. Washburn*, 22 Ohio St. 321; *Dana v. Railroad Co.*, 50 How. Prac. 428. A carrier who acts as the forwarding agent of the owner of goods, in giving directions, by way bills or otherwise, to the successive lines of transportation over which they are to be carried, beyond the termination of his own route, is responsible, as such forwarding agent, only for want of reasonable diligence and care. *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen, 254.

<sup>689</sup> *Wehmann v. Railway Co.*, 58 Minn. 22, 59 N. W. 546. Notifying second carrier to take goods, which he does not do, is not a discharge. *Goold v. Chapin*, 20 N. Y. 259. If carrier of freight to be transferred to another carrier merely stores it in warehouse of its own, whence the other is in habit of taking it at its convenience, and freight, while so stored, is destroyed, first carrier is liable for its value. *Condon v. Marquette, H. & O. R. Co.*, 55 Mich. 218, 21 N. W. 321. *S. P. Lawrence v. Railroad Co.*, 15 Minn. 390 (Gil. 313), *Wood v. Railway Co.*, 27 Wis. 541; *Conkey v. Railway Co.*, 31 Wis. 619. If a carrier is ready to deliver goods to succeeding carrier, yet it is liable as common carrier for a reasonable time, until, according to usual course of business, the vessel of the succeeding carrier can arrive to take the goods. *Mills v. Railroad Co.*, 45 N. Y. 622. Compare *Barter v. Wheeler*, 49 N. H. 9. Taking of part of a lot of goods by a railroad company from a steamboat company, and fact that rest were pointed out and ready to be taken from the boat, does not necessarily constitute constructive delivery of the whole. *Gass v. New York, P. & B. R. Co.*, 99 Mass. 220. Carrier is not discharged of his liability where he receives goods for transportation to point beyond end of his route, and there are public means of transportation from there to place of destination, by delivering them to mere wharfinger at end of his route, in absence of established usage to that effect, but he must deliver them to some proper carrier to be taken further. But, when there are no public means of further transportation, such point must be regarded as place of destination, and he may properly deliver to warehouseman or wharfinger. *Hermann v. Goodrich*, 21 Wis. 543.

<sup>690</sup> *Conkey v. Railroad Co.*, 31 Wis. 619; *Barter v. Wheeler*, 49 N. H. 9; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *In re Petersen*, 21 Fed. 885;

insurer for their safe transportation; and if the operations of one carrier cover a part only of the line of transit, and another is to receive the goods from him, the shipper has a right to understand that the liability of an insurer is upon some one during the whole period. The duty of the one is not discharged until it has been imposed upon the succeeding carrier, and this is not done until there is delivery of the goods, or at least such a notification to the succeeding carrier as, according to the course of the business, is equivalent to a tender of delivery. There is nothing in this which is burdensome to the carrier, for this is the customary method in which the business is done, and the rule only requires that the customary method shall be pursued, without unreasonable delay or negligence.<sup>691</sup> The owner loses sight of his goods when he delivers them to the first carrier, and has no means of learning their whereabouts till he or the consignee is informed of their arrival at the place of destination. At each successive point of transfer from one carrier to another, they are liable to be placed in warehouses, there, perhaps, to be delayed by the accumulation of freight, or other causes, and exposed to loss by fire or theft, with-

If the carrier to whom the shipper has directed the goods to be delivered refuses to receive them for transportation, the first carrier must notify the consignor, and, by so doing, becomes liable only as warehouseman. Without instructions from the consignor, there is no right to forward the goods by another route. *Johnson v. Railroad Co.*, 33 N. Y. 610; *Rawson v. Holland*, 59 N. Y. 611; *Nutting v. Railroad Co.*, 1 Gray, 502; *Louisville & N. R. Co. v. Campbell*, 7 Heisk. (Tenn.) 253; *Lesinsky v. Dispatch Co.*, 10 Mo. App. 134; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *In re Petersen*, 21 Fed. 885; *Deming v. Railroad Co.*, Id. 25. But, in *Regan v. Railway*, 61 N. H. 579, where perishable goods were shipped, and the connecting carrier designated was unable to receive them, it was held that the first carrier exercised reasonable care by forwarding the goods over another route. It may be provided, by agreement or custom between connecting carriers, that a constructive delivery shall terminate the first carrier's liability, without an actual change of possession. See *McDonald v. Railroad Corp.*, 34 N. Y. 497; *Condon v. Railroad Co.*, 55 Mich. 218, 21 N. W. 321; *Converse v. Transportation Co.*, 33 Conn. 166; *Pratt v. Railway Co.*, 95 U. S. 43. The owner may take advantage of such a usage, and recover against the carrier to whom the goods have been constructively delivered. *Aetna Ins. Co. v. Wheeler*, 49 N. Y. 616.

<sup>691</sup> *Condon v. Railroad*, 55 Mich. 218, 21 N. W. 321. And see *Louisville, St. L. & T. R. Co. v. Bourne* (Ky.) 29 S. W. 975.

out fault on the part of the carrier or his agents. Superadded to these risks are the dangers of loss by collusion,—quite as imminent while the goods are thus stored at some point unknown to the owner as while they are in actual transit. The storing under such circumstances is held to be a mere accessory to the transportation.<sup>692</sup>

*When Liable for Through Transportation—The Prevailing Rule.*

It is the duty of a common carrier to receive and transport goods over its own line,—a duty which it must perform, or respond in damages.<sup>693</sup> But it is not its duty to transport such goods over the line of any other carriers, or to contract for such transportation, and it cannot be compelled to assume such an obligation. Its entire common-law duty is limited to its own line. It owes nothing to the public beyond that.<sup>694</sup> But a carrier may assume an additional obligation of this kind, and become an insurer of the goods throughout the whole course of the transportation; that is, the first carrier may make its liability as a common carrier continue until the goods have reached their ultimate destination. This is done by contracting to carry the goods to their destination. By so doing the initial carrier makes the succeeding carriers its agents, and becomes responsible for their defaults. This liability for through transportation may, of course, be assumed by an express contract;<sup>695</sup> but such an agreement will not be inferred from doubtful expressions or loose language, but only from clear and

<sup>692</sup> McDonald v. Railroad Corp., 34 N. Y. 497; Fenner v. Railroad Co., 41 N. Y. 505.

<sup>693</sup> See ante, p. 321.

<sup>694</sup> Berg v. Railroad Co., 30 Kan. 561, 2 Pac. 639.

<sup>695</sup> Burtis v. Railroad Co., 24 N. Y. 269, 272; Root v. Railroad Co., 45 N. Y. 524, 532; Quimby v. Vanderbilt, 17 N. Y. 306; Hill Manuf'g Co. v. Boston & L. R. Corp., 104 Mass. 122; Gray v. Jackson, 51 N. H. 9; Phillips v. Railroad Co., 78 N. C. 294; Railroad Co. v. Pratt, 22 Wall. 123; Woodward v. Railroad Co., 1 Biss. 403, Fed. Cas. No. 18,006; Benett v. Steamboat Co., 6 C. B. 775. But see dicta contra, Hood v. Railroad Co., 22 Conn. 1; Converse v. Transportation Co., 33 Conn. 166; Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468; Elmore v. Railroad Co., 23 Conn. 457. As to liability for delay, see International & G. N. R. Co. v. Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691. And cf. Johnson v. Railway Co., 90 Ga. 810, 17 S. E. 121. Such a contract, by a railroad company or other corporation doing business as a common carrier, is not ultra



satisfactory evidence.<sup>696</sup> In the absence of such an express contract, in the greater number of our states, a carrier does not become liable for the through transportation of goods merely by accepting them, directed to a point beyond its own line; that is, the carrier is *prima facie* liable only to the end of its line.<sup>697</sup>

*Same—The English Rule.* *The initial carrier and it alone is responsible.*

The rule just stated is not, however, the law in England. The leading case supporting the English rule is *Muschamp v. Lancaster*

*vires.* *Swift v. Steamship Co.*, 106 N. Y. 206, 12 N. E. 583; *Buffett v. Railroad Co.*, 40 N. Y. 168; *Bissell v. Railroad Co.*, 22 N. Y. 258; *Hill Manuf'g Co. v. Boston & L. R. Corp.*, 104 Mass. 122; *Baltimore & Philadelphia Steamboat Co. v. Brown*, 54 Pa. St. 77; *Western & A. R. Co. v. McElwee*, 6 Heisk. (Tenn.) 208, 219; *Noyes v. Railroad Co.*, 27 Vt. 110; *Railroad Co. v. Pratt*, 22 Wall. 123.

<sup>696</sup> *Myrick v. Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. 425.

<sup>697</sup> *Elmore v. Railroad Co.*, 23 Conn. 457, 470; *Hood v. Railroad Co.*, 22 Conn. 502; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468; *Converse v. Transportation Co.*, 33 Conn. 166; *Savannah, F. & W. Ry. Co. v. Harris*, 26 Fla. 148, 7 South. 544; *Pittsburgh, C. & St. L. Ry. Co. v. Morton*, 61 Ind. 539; *Hill v. Railway Co.*, 60 Iowa, 196, 14 N. W. 249; *Perkins v. Railroad Co.*, 47 Me. 573; *Skinner v. Hall*, 60 Me. 477; *Inhabitants of Plantation No. 4 v. Hall*, 61 Me. 517; *Baltimore & O. R. Co. v. Schumacher*, 29 Md. 168, 176; *Nutting v. Railroad Co.*, 1 Gray, 502; *Darling v. Railroad Corp.*, 11 Allen, 295; *Burroughs v. Railroad Co.*, 100 Mass. 26; *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189; *Pendergast v. Express Co.*, 101 Mass. 120; *Pratt v. Railroad Co.*, 102 Mass. 557; *Crawford v. Railroad Ass'n*, 51 Miss. 222; *McMillan v. Railroad Co.*, 16 Mich. 79; *Detroit & B. C. R. Co. v. McKenzie*, 43 Mich. 609, 5 N. W. 1031; *Rickerson Roller-Mill Co. v. Grand Rapids & I. R. Co.*, 67 Mich. 110, 34 N. W. 269; *Irish v. Railway Co.*, 19 Minn. 376 (Gil. 323); *Lawrence v. Railroad Co.*, 15 Minn. 390 (Gil. 313); *Grover & Baker Sewing Mach. Co. v. Missouri Pac. Ry. Co.*, 70 Mo. 672; *Van Santvoord v. St. John*, 6 Hill, 157; *Lamb v. Transportation Co.*, 46 N. Y. 271; *Condict v. Railway Co.*, 54 N. Y. 500; *Rawson v. Holland*, 59 N. Y. 611; *Reed v. Express Co.*, 48 N. Y. 462; *Phillips v. Railroad Co.*, 78 N. C. 294; *Lindley v. Railroad*, 88 N. C. 547; *Knott v. Railroad Co.*, 98 N. C. 73, 3 S. W. 735; *Camden & A. R. Co. v. Forsyth*, 61 Pa. St. 81; *American Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394; *Pennsylvania Cent. R. Co. v. Schwarzenberger*, 45 Pa. St. 408; *Clyde v. Hubbard*, 88 Pa. St. 358; *Knight v. Railroad Co.*, 13 R. I. 572; *Harris v. Railway*, 15 R. I. 371, 5 Atl. 305; *Piedmont Manuf'g Co. v. Columbia & G. R. Co.*, 19 S. C. 353 (but see *Kyle v. Railroad Co.*, 10 Rich [S. C.] 382); *McConnell v. Railroad Co.*, 86 Va. 248, 9 S. C. 1006; *Myrick v. Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. 425; *Stewart v. Railroad Co.*, 1 McCrary, 312, 3 Fed. 768; *Railroad Co. v. Manu-*

& P. J. Ry. Co.,<sup>698</sup> in which it was held that when a railway company take into their care a parcel directed to a particular place, and do not, by positive agreement, limit their responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking to carry the parcel to the place to which it is directed, although that place be beyond the limits within which the company, in general, profess to carry on their business of carriers.<sup>699</sup> This rule has been followed in some American cases,<sup>700</sup> and the Missouri<sup>701</sup> and South Carolina<sup>702</sup> statutes lay down the same rule. The English courts go so far as to hold that only the first carrier can be sued for a loss occurring on any of the lines.<sup>703</sup> This has been followed in none of our courts,<sup>704</sup> except in Georgia,<sup>705</sup> and is now

facturing Co., 16 Wall. 318; Railroad Co. v. Pratt, 22 Wall. 123; Insurance Co. v. Railroad Co., 104 U. S. 146.

<sup>698</sup> 8 Mees. & W. 421.

<sup>699</sup> Watson v. Railway Co., 3 Eng. Law & Eq. 497; Mytton v. Railway Co., 28 Law J. Exch. 385; Coxon v. Railway Co., 5 Hurl. & N. 274; Bristol & F. Ry. Co. v. Collins, Id. 969, 29 L. J. Exch. 41.

<sup>700</sup> Mobile & G. R. Co. v. Copeland, 63 Ala. 219; Louisville & N. R. Co. v. Meyer, 78 Ala. 597; Falvey v. Railroad Co., 76 Ga. 597; Rome R. Co. v. Sullivan, 25 Ga. 228; Mosher v. Express Co., 38 Ga. 37; Southern Exp. Co. v. Shea, Id. 519; Cohen v. Express Co., 45 Ga. 148; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332; Illinois Cent. R. Co. v. Johnson, 34 Ill. 389; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88; Chicago & N. W. Ry. Co. v. People, 56 Ill. 365; United States Exp. Co. v. Haines, 67 Ill. 137; Adams Exp. Co. v. Wilson, 81 Ill. 339; Erie Ry. Co. v. Wilcox, 84 Ill. 239; Angle v. Railroad Co., 9 Iowa, 487; Mulligan v. Railway Co., 36 Iowa, 181; Cincinnati, H. & D. R. Co. v. Spratt, 2 Duv. (Ky.) 4; Nashua Lock Co. v. Worcester & N. R. Co., 48 N. H. 339; Western & A. R. Co. v. McElwee, 6 Heisk. (Tenn.) 208; East Tennessee & V. R. Co. v. Rogers, Id. 143; Louisville & N. R. Co. v. Campbell, 7 Heisk. (Tenn.) 253; Carter v. Peck, 4 Sneed (Tenn.) 203; East Tennessee & G. R. Co. v. Nelson, 1 Cold. (Tenn.) 272.

<sup>701</sup> Rev. St. 1880, § 944.

<sup>702</sup> Gen. St. § 1513; Rev. St. 1893, § 1720.

<sup>703</sup> Collins v. Railway Co., 11 Exch. 790; Coxon v. Railway Co., 5 Hurl. & N. 274; Mytton v. Railway Co., 4 Hurl. & N. 615.

<sup>704</sup> Barter v. Wheeler, 49 N. H. 9; Chicago & N. W. R. Co. v. Northern Line Packet Co., 70 Ill. 217; Chesapeake & O. R. Co. v. Radbourne, 52 Ill. App. 203; Southern Exp. Co. v. Hess, 53 Ala. 19. Cf. Anchor Line v. Dater, 68 Ill. 369.

<sup>705</sup> Southern Exp. Co. v. Shea, 38 Ga. 519.

otherwise in that state, by statute.<sup>706</sup> Even in the states following the English rule a carrier may avoid liability beyond its own line by contract.<sup>707</sup> Such a contract is not void on the ground that the carrier cannot contract against its own negligence. It is not a case in which a common carrier is attempting to limit its common-law liability by contract.<sup>708</sup> Even under the Missouri statute, the carrier may contract against liability beyond its own line.<sup>709</sup> In any case, however, the contract must show expressly that the first carrier's undertaking is to carry over its own line, and to deliver at its terminus to the next carrier,<sup>710</sup> otherwise a clause attempting to restrict liability to the company in whose charge the goods are at the time of loss or injury will be inoperative.<sup>711</sup>

*Same—Authority of Agents to Make Through Contracts.*

The general freight agent of a railroad company has power to bind the company by a contract for transportation to points beyond its own line;<sup>712</sup> but a station agent has no such power, and such a contract entered into by him is void, unless the authority

<sup>706</sup> Code, § 2084; *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522.

<sup>707</sup> *Berg v. Railroad Co.*, 30 Kan. 561, 2 Pac. 639; *Jones v. Railroad Co.*, 89 Ala. 376, 8 South. 61; *Texas & P. Ry. Co. v. Adams*, 78 Tex. 372, 14 S. W. 666; *Tolman v. Abbot*, 78 Wis. 192, 47 N. W. 264; *Mulligan v. Railway Co.*, 36 Iowa. 181; *Taylor v. Railroad Co.*, 32 Ark. 393; *Aldrige v. Railway Co.*, 15 C. B. (N. S.) 582; *Fowles v. Railway Co.*, 7 Exch. 699; *Kent v. Railway Co.*, L. R. 10 Q. B. 1.

<sup>708</sup> See ante, p. 413.

<sup>709</sup> *Dimmitt v. Railroad Co.*, 103 Mo. 433, 15 S. W. 761. Contra, *Baker v. Railway Co.*, 34 Mo. App. 98.

<sup>710</sup> *Pendergast v. Express Co.*, 101 Mass. 120; *American Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394; *United States Exp. Co. v. Rush*, 24 Ind. 403; *Inhabitants of Plantation No. 4 v. Hall*, 61 Me. 517; *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.*, 67 Mich. 110, 34 N. W. 269; *Detroit & B. C. Ry. Co. v. McKenzie*, 43 Mich. 609, 5 N. W. 1031; *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 1 Sup. Ct. 425.

<sup>711</sup> *Milne v. Douglass*, 13 Fed. 37; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Railroad Co. v. Pratt*, 22 Wall. 123; *Gulf, C. & S. F. R. Co. v. Golding*, 23 Am. & Eng. Ry. Cas. 732; *Cincinnati, H. & D. R. Co. v. Portius*, 19 Ohio St. 221; *Condict v. Railway Co.*, 54 N. Y. 500.

<sup>712</sup> *Grover & Baker Sewing Mach. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672; *White v. Railroad Co.*, 19 Mo. App. 400.

has been expressly conferred by the proper superior officer, or there have been previous dealings from which the authority may be reasonably inferred, or the company has held itself out as a common carrier to such points.<sup>713</sup> Thus, where other similar contracts had been made by the station agent, and such contracts had been recognized and carried out by defendant, this was said to be a course of dealing between the shipper and the carrier's agent from which the authority of the agent to make the contract might be inferred.<sup>714</sup> But all those states which recognize the "English rule" would probably hold that a local agent has power to make a binding contract for through transportation.<sup>715</sup>

*Same—Implied Contract.*

The contract which will make a carrier liable for through transportation need not contain express words to that effect. The assumption of liability for losses beyond the carrier's line may be implied from the circumstances of the case, and special words used in the receipt or bill of lading.<sup>716</sup> In the states following the rule which is supported by the weight of authority,—that is, that the carrier is *prima facie* liable only for losses on its own line,—the following circumstances are evidence of a through contract, but not conclusive.<sup>717</sup> The use of the words "to forward," or "to be forwarded," in the carrier's receipt;<sup>718</sup> a receipt or bill of lad-

<sup>713</sup> *Burroughs v. Railroad Co.*, 100 Mass. 26; *Turner v. Railroad Co.*, 20 Mo. App. 632; *Grover & Baker Sewing Mach. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672.

<sup>714</sup> *White v. Missouri Pac. R. Co.*, 19 Mo. App. 400.

<sup>715</sup> *Hansen v. Railroad Co.*, 73 Wis. 316, 41 N. W. 529. And see *Watson v. Railway Co.*, 15 Jur. 448; *Scothorn v. Railway Co.*, 8 Exch. 341; *Bristol & E. Ry. Co. v. Collins*, 7 H. L. Cas. 194.

<sup>716</sup> *Berg v. Steamship Co.*, 5 Daly, 334; *Robinson v. Transportation Co.*, 45 Iowa, 470; *Piedmont Manuf'g Co. v. Columbia & G. R. Co.*, 19 S. C. 353; *Illinois Cent. R. Co. v. Kerr*, 68 Miss. 14, 8 South. 330; *Candee v. Railroad Co.*, 21 Wis. 582; *International & G. N. Ry. Co. v. Tisdale*, 74 Tex. S. 11 S. W. 900; *Railroad Co. v. Androsoggin Mills*, 22 Wall. 594. And see *Camden & A. R. Co. v. Forsyth*, 61 Pa. St. 81.

<sup>717</sup> *Root v. Railroad Co.*, 45 N. Y. 524, 532; *Hill Manuf'g Co. v. Boston & L. R. Corp.*, 104 Mass. 122; *Camden & A. R. Co. v. Forsyth*, 61 Pa. St. 81; *Piedmont Manuf'g Co. v. Columbia & G. R. Co.*, 19 S. C. 353; *Woodward v. Railroad Co.*, 1 Biss. 403, Fed. Cas. No. 18,006.

<sup>718</sup> *Reed v. Express Co.*, 48 N. Y. 462; *Mercantile Mut. Ins. Co. v. Chase*, 1

ing which purports to be a through contract;<sup>719</sup> the giving of a through rate;<sup>720</sup> the prepayment of freight for the whole transportation;<sup>721</sup> the carrier's holding out to carry over the whole distance;<sup>722</sup> or an agreement that the goods be carried through in a particular car.<sup>723</sup> In those states which follow the English rule, these circumstances are conclusive of a through contract.<sup>724</sup>

E. D. Smith, 115; Wilcox v. Parmelee, 3 Sandf. 610; Schroeder v. Railroad Co., 5 Duer, 55; Buckland v. Express Co., 97 Mass. 124; Nashua Lock Co. v. Worcester & N. R. Co., 48 N. H. 339; Cutts v. Brainerd, 42 Vt. 566; East Tennessee & V. R. Co. v. Rogers, 6 Heisk. (Tenn.) 143; St. Louis, K. C. & N. Ry. Co. v. Piper, 13 Kan. 376.

<sup>719</sup> Helliwell v. Railway Co., 7 Fed. 68; Richardson v. The Charles P. Chouteau, 37 Fed. 532; Harp v. The Grand Era, 1 Woods, 184, Fed. Cas. No. 6,084; Myrick v. Railroad Co., 9 Biss. 44, Fed. Cas. No. 10,001; Houston & T. C. R. Co. v. Park, 1 White & W. Civ. Cas. Ct. App. § 332; Texas & P. R. Co. v. Parrish, Id. § 942; Loomis v. Railway Co., 17 Mo. App. 340; Moore v. Henry, 18 Mo. App. 35; Wiggins Ferry Co. v. Chicago & A. R. Co., 73 Mo. 389.

<sup>720</sup> Weed v. Railroad Co., 19 Wend. (N. Y.) 534; Berg v. Steamship Co., 5 Daly (N. Y.) 394; Clyde v. Hubbard, 88 Pa. St. 358; Candee v. Railroad Co., 21 Wis. 589; Aiken v. Railway Co., 68 Iowa, 363; Railroad Co. v. Androscoggin Mills, 22 Wall. 594. But see McCarthy v. Railroad Co., 9 Mo. App. 159; East Tennessee & G. R. Co. v. Montgomery, 44 Ga. 278.

<sup>721</sup> Berg v. Steamship Co., 5 Daly (N. Y.) 394; Candee v. Railroad Co., 21 Wis. 589; Weed v. Railroad Co., 19 Wend. (N. Y.) 534; Piedmont Manuf'g Co. v. Columbia & G. R. Co., 19 S. C. 353; Illinois Cent. R. Co. v. Kerr, 68 Miss. 14, 8 South. 330.

<sup>722</sup> Lawson, Bailm. § 103; Root v. Railroad Co., 45 N. Y. 524; Collender v. Dinsmore, 55 N. Y. 200; Toledo, P. & W. Ry. Co. v. Merriman, 52 Ill. 123; Hill Manuf'g Co. v. Boston & L. R. Corp., 104 Mass. 122; Robinson v. Merchants' Dispatch Transp. Co., 45 Iowa, 470; Harris v. Railroad Co. (R. I.) 16 Atl. 512; St. John v. Express Co., 1 Woods, 612, Fed. Cas. No. 12,228; Chicago, St. L. & P. R. Co. v. Wolcott (Ind. Sup.) 39 N. E. 451.

<sup>723</sup> International & G. N. Ry. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900.

<sup>724</sup> Hutch. Carr. (2d Ed.) § 152; Ohio R. Co. v. Emrich, 24 Ill. App. 245; Wabash, St. L. & P. Ry. Co. v. Jaggerman, 115 Ill. 407, 4 N. E. 641; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332; Illinois Cent. R. Co. v. Johnson, 34 Ill. 389; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88; Central Railroad & Banking Co. v. Georgia Fruit & Vegetable Exch., 91 Ga. 389, 17 S. E. 904; Adams Exp. Co. v. Wilson, 81 Ill. 339; Weed v. Railroad Co., 19 Wend. 534; Hansen v. Railroad Co., 73 Wis. 346, 41 N. W. 529; Angle v. Railroad Co., 9 Iowa, 487; Mulligan v. Railway Co., 36 Iowa, 181; Pereira v. Railroad Co., 66 Cal. 92, 4 Pac. 988; Halliday v. Railway Co., 74 Mo. 159; Atlanta & W. P.



*Same—Partnership Liability.*

If two or more connecting carriers enter into a partnership agreement for the transportation of freight or baggage over a through route, each partner becomes liable for the defaults of the others.<sup>725</sup> The result is the same as to third persons if the carriers hold themselves out as partners, though they are not such in fact. They are estopped to deny the partnership as to one who has intrusted goods to their care in reliance on such representation.<sup>726</sup> In order that connecting carriers may be bound by a contract for through transportation made by the carrier to whom the goods are first delivered, the latter must have authority, by virtue of the existence of a partnership between itself and the other lines over which the cattle were to pass, or by virtue of an agency conferred on it by the other companies, empowering it to make a contract which would bind them jointly. In the absence of such authority, the contract is simply the contract of the company that makes it, by which it is bound to transport the goods on its own line as far as that extends, and beyond that to furnish transportation through other lines.<sup>727</sup> But, in the absence of express authority, facts may appear which will be sufficient to show a ratification of a contract so made; but a railway company cannot

R. Co. v. Texas Grate Co., 81 Ga. 602, 9 S. E. 600; Baltimore & O. R. Co. v. Campbell, 36 Ohio, 647; Carter v. Peck, 4 Sneed (Tenn.) 203; Western & A. R. Co. v. McElwee, 6 Heisk. (Tenn.) 208; East Tennessee & V. R. Co. v. Rogers, Id. 143; Louisville & N. R. Co. v. Campbell, 7 Heisk. (Tenn.) 253.

<sup>725</sup> Cobb v. Abbot, 14 Pick. 289; Briggs v. Vanderbilt, 19 Barb. 222, 237; Hart v. Railroad Co., 8 N. Y. 37; Bostwick v. Champion, 11 Wend. 571, affirmed 18 Wend. 175; Montgomery & W. P. R. Co. v. Moore, 51 Ala. 84; Elsworth v. Tarrt, 26 Ala. 733; Weyland v. Elkins, Holt, N. P. 227, 1 Starkie, 272; Fromont v. Coupland, 2 Bing. 170. Though a railroad company or other corporation doing business as a carrier may have no power to form such a partnership, it is still liable to third persons when it has attempted to do so and has held itself out as such. Swift v. Steamship Co., 106 N. Y. 206, 12 N. E. 583; Wylde v. Railroad Co., 53 N. Y. 156; Block v. Railroad Co., 139 Mass. 308, 1 N. E. 348; Barter v. Wheeler, 49 N. H. 90.

<sup>726</sup> Pattison v. Blanchard, 5 N. Y. 186; Bostwick v. Champion, 11 Wend. 571, affirmed 18 Wend. 175.

<sup>727</sup> Gulf, C. & S. F. Ry. Co. v. Baird, 75 Tex. 256, 12 S. W. 530; Ft. Worth & D. C. R. Co. v. Williams, 77 Tex. 121, 13 S. W. 637. Cf. Gulf, C. & S. F. Ry. Co. v. Clarke, 5 Tex. Civ. App. 547, 24 S. W. 355.

be held to have ratified a contract from the fact that it performed some of the services contemplated by it, when it is not at liberty, contract or no contract, to refuse to render the service; as where, at the time the cars in which goods were, were received from the prior carrier, the law provided that "every such company shall for a reasonable compensation draw over their railroad, without delay, the passengers, merchandise, and cars of every other railroad company which may enter and connect with their railroad."<sup>728</sup>

That a contract for through transportation over the connecting lines of several railway companies, as between themselves composing a partnership, or holding themselves out as such, is binding on all, and one responsible for the act of another, results from the fact that the contracting company has power so to bind all. It is upon the same ground, when no partnership exists, that several carriers may be jointly bound by a contract made by one in the exercise of an agency conferred on it by the others.<sup>729</sup> The chief difficulty in these cases is to determine what arrangements constitute partnerships.<sup>730</sup> Rothrock, C. J., in an Iowa case,<sup>731</sup> quotes with approval the rule laid down by Mr. Hutchinson,<sup>732</sup> which is "that where carriers over different routes have associated themselves under a contract for a division of the profits of the carriage in certain proportions, or of the receipts from it, after deducting any of the expenses of the business, they become jointly liable, as partners, to third persons,<sup>733</sup> but that where the agreement is that

<sup>728</sup> *Ft. Worth & D. C. R. Co. v. Williams*, 77 Tex 121, 13 S. W. 637; *Ft. Worth & D. C. R. Co. v. Fuller*, 3 Tex. Civ. App. 340, 22 S. W. 1006.

<sup>729</sup> *Wells, Fargo & Co. v. Battle*, 5 Tex. Civ. App. 532, 24 S. W. 353; *Gulf, C. & S. F. R. Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. 626.

<sup>730</sup> See *Wehmann v. Railway Co.* (Minn.) 59 N. W. 546.

<sup>731</sup> *Peterson v. Railroad Co.*, 80 Iowa, 92, 45 N. W. 573.

<sup>732</sup> *Hutch. Carr.* (2d Ed.) § 169.

<sup>733</sup> *Carter v. Peck*, 4 Sneed (Tenn.) 203; *Hart v. Railroad Co.*, 8 N. Y. 37; *Cincinnati, H. & D. R. Co. v. Spratt*, 2 Duv. (Ky.) 4; *Block v. Railroad Co.*, 139 Mass. 308, 1 N. E. 348; *Hill Manuf'g Co. v. Boston & L. R. Corp.*, 104 Mass. 122; *Wyman v. Railroad Co.*, 4 Mo. App. 35. But see *Elliott v. Railroad Co.*, 58 Mo. App. 80. Where the owners of stage lines each provided their own carriages and horses, employed their own drivers, and paid the expenses of their separate sections of the route, except the tolls at turnpike gates, and the moneys received as the fare of passengers, after deducting such tolls, were divided among the occupants of the several sections, in proportion to the

each shall bear the expenses of his own route, and of the transportation upon it, and that the gross receipts shall be divided in proportion to distance or otherwise, they are partners neither inter se nor as to third persons, and incur no joint liability."<sup>734</sup> Connecting carriers may be liable, when no partnership exists between them, and they have not held themselves out as partners, by the employment of a joint agent;<sup>735</sup> as where connecting stage lines employ a driver for the whole route.<sup>736</sup> And it has been held, where two express companies have a single messenger for the entire transit, that the first company could not limit its liability for losses due to the fault of such messenger to its own line.\*

number of miles of the route run by each, they were held liable as partners *Bostwick v. Champion*, 11 Wend. 571, affirmed 18 Wend. 175. But the fact that the connecting carriers transact their true business by means of a joint committee or a common agent will not make them liable as such. *Straiton v. Railroad Co.*, 2 E. D. Smith, 184; *Ellsworth v. Tartt*, 26 Ala. 733; *Watkins v. Railroad Co.*, 8 Mo. App. 569. An agreement to share pro rata losses that cannot be located does not make the connecting carriers partners. *Algen v. Railroad Co.*, 132 Mass. 423. An arrangement between a dispatch company of St. Louis, Mo., and sundry railroad companies whose lines terminated at New York, whereby the latter separately agreed to carry all goods for the transportation of which the former should contract, does not involve joint liability upon the part of the railroad companies, nor make them partners either inter se or as to third persons. *Insurance Co. v. Railroad Co.*, 104 U. S. 146.

<sup>734</sup> *Ellsworth v. Tartt*, 26 Ala. 733; *Montgomery & W. P. R. Co. v. Moore*, 51 Ala. 394; *Insurance Co. v. Railroad Co.*, 104 U. S. 146; *Briggs v. Vanderbilt*, 19 Barb. 222; *Gass v. Railroad Co.*, 99 Mass. 220; *Converse v. Transportation Co.*, 33 Conn. 166. Where several persons were engaged in running a line of stages, and, by the agreement between them, one was to run at his own expense a certain portion of the route, and the others, in like manner, the residue, each being authorized to receive fare from passengers over the whole or any part of the route, and the fare so received to be divided between them in proportion to the distance which they respectively transported such passengers, held, that this did not constitute a partnership between the parties. *Pattison v. Blanchard*, 5 N. Y. 186.

<sup>735</sup> *Cobb v. Abbot*, 14 Pick. 289; *Schutter v. Express Co.*, 5 Mo. App. 316; *Wilson v. Railroad Co.*, 21 Grat. (Va.) 654; *Carter v. Peck*, 4 Sneed (Tenn.) 203.

<sup>736</sup> *Cobb v. Abbot*, supra.

\* *Schutter v. Express Co.*, 5 Mo. App. 316.

*Presumption and Burden of Proof.*

When goods are lost or injured in the course of transportation over connecting lines, the consignor has no direct means of showing where the loss occurred, and certain presumptions are therefore raised in his favor.<sup>737</sup> The plaintiff in such an action must show (1) delivery in good order to the first carrier, and (2) nondelivery to the consignee, or (3) delivery in a damaged condition.<sup>738</sup> If the action is against the first carrier, it may be shown in defense that the goods were delivered to the next carrier in the same condition as when they were received.<sup>739</sup> In an action against the last carrier, if it is shown that the goods were delivered to the first carrier in good order, this condition, in the absence of a contrary showing,<sup>740</sup> will be presumed to continue until the goods come into the possession of the last carrier, and that the injury occurred on that line.<sup>741</sup> This is on the principle that things once proved to have existed in a certain condition are presumed to have continued in that condition until the contrary is established by evidence.<sup>742</sup> Thus, where goods in a box are shipped over connecting lines, and when delivered to the consignee, although there is no external indication of the fact, the box is found to have been opened, and certain goods abstracted therefrom, the jury may presume, in the absence of evidence to the contrary, that the box remained unopened until it

<sup>737</sup> *Laughlin v. Railroad Co.*, 28 Wis. 204.

<sup>738</sup> *Smith v. Railroad Co.*, 43 Barb. 225; *Brintnall v. Railroad Co.*, 32 Vt. 265; *Missouri Pac. R. Co. v. Breeding* (Tex. App.) 16 S. W. 184; *Goodman v. Navigation Co.* (Or.) 28 Pac. 894, 898.

<sup>739</sup> *Laughlin v. Railway Co.*, 28 Wis. 204; *Smith v. Railroad Co.*, 43 Barb. 225; *Brintnall v. Railroad Co.*, 32 Vt. 265.

<sup>740</sup> *Gulf, C. & S. F. R. Co. v. Malone* (Tex. Civ. App.) 25 S. W. 1077.

<sup>741</sup> *Laughlin v. Railroad Co.*, 28 Wis. 204; *Mobile & O. R. Co. v. Tupelo Furniture Manuf'g Co.*, 67 Miss. 35, 7 South. 279; *Texas & P. R. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 23 S. W. 801; *Texas & P. R. Co. v. Adams*, 78 Tex. 372, 14 S. W. 666; *Lin v. Railroad Co.*, 10 Mo. App. 125; *Central Railroad & Banking Co. v. Bayer*, 91 Ga. 115, 16 S. E. 533; *International & G. N. R. Co. v. Folts*, 22 S. W. 541; *Faison v. Railway Co.*, 69 Miss. 569, 13 South. 37. But see *International & G. N. R. Co. v. Wolf*, 3 Tex. Civ. App. 383, 22 S. W. 187; *Western Ry. Co. v. Harwell*, 97 Ala. 341, 11 South. 781.

<sup>742</sup> *Smith v. Railroad Co.*, 43 Barb. 225; *Laughlin v. Railroad Co.*, 28 Wis. 204; *Louisville & N. R. Co. v. Jones* (Ala.) 14 South. 114; *Forester v. Banking Co.*, 92 Ga. 699, 19 S. E. 811.

came into the possession of the last carrier, and that the loss occurred through its fault.<sup>743</sup>

**98. EXCUSES FOR NONDELIVERY**—A common carrier is excused from delivering the goods to the consignee according to the contract of carriage—

- (a) When they are demanded by one having paramount title (p. 479). 1.
- (b) When the consignor has stopped them in transitu (p. 480). 2.
- (c) When the carrier has lost them through an excepted peril (p. 482). 3.

*Delivery to Wrong Person.*

A carrier, by accepting goods for transportation, agrees to deliver them according to the terms of the shipment,<sup>744</sup> and for a delivery to any other person than the consignee the carrier is liable as for a conversion.<sup>745</sup> The reasons for this rule have already been discussed.<sup>746</sup> If the carrier has, through fraud or mistake, delivered the goods to the wrong person, the fact that there has been no negligence is not an excuse. The carrier is liable as an insurer, and the question of diligence is immaterial.<sup>747</sup> If an in-

<sup>743</sup> Laughlin v. Railway Co., 28 Wis. 204.

<sup>744</sup> Bailey v. Railroad Co., 49 N. Y. 70.

<sup>745</sup> McEntee v. Steamboat Co., 45 N. Y. 34; Price v. Railway Co., 50 N. Y. 213; Powell v. Myers, 26 Wend. 591; Hawkins v. Hoffman, 6 Hill, 586; American Merchants' Union Exp. Co. v. Milk, 73 Ill. 224; Samuel v. Cheney, 135 Mass. 278; Claflin v. Railroad Co., 7 Allen, 341; Hall v. Railroad Corp., 14 Allen, 442; Wernwag v. Railroad Co., 117 Pa. St. 46, 11 Atl. 888; American Exp. Co. v. Stack, 29 Ind. 27; American Exp. Co. v. Fletcher, 25 Ind. 492; Winslow v. Railroad Co., 42 Vt. 700; Southern Exp. Co. v. Van Meter, 17 Fla. 783; Gosling v. Higgins, 1 Camp. 451; Lubbock v. Inglis, 1 Starkie, 104; Shearer v. Express Co., 43 Ill. App. 641. Where a carrier, on refusal of the consignee to receive goods, delivers them to one who represents himself to be the agent of the consignor, without notice to the latter, and the agent converts the goods to his own use, the carrier is liable therefor. American Sugar-Refining Co. v. McGhee (Ga.) 21 S. E. 383.

<sup>746</sup> Ante, p. 32.

<sup>747</sup> McEntee v. Steamboat Co., 45 N. Y. 34; Price v. Railway Co., 50 N. Y. 213; Guillaume v. Packet Co., 42 N. Y. 212; Viner v. Steamship Co., 50 N. Y.



postor induces the consignor to ship goods to a fictitious person or firm, the carrier is liable for a delivery to the impostor.<sup>748</sup> So, too, the carrier is liable if an impostor procures a consignment of goods to be made to a real person, and then secures the goods from the carrier by representing himself to be that person.<sup>749</sup> If, however, the consignor intends the goods for the person to whom the carrier delivers them, then the carrier is not liable, though the consignor has been defrauded by a mistake on his part as to the identity of the consignee. Thus, if A., fraudulently assuming the name of a reputable merchant in a certain town, buys goods of another, the property in the goods passes to A., and the seller cannot maintain an action against a common carrier, to whom the car-

23; *Clafin v. Railroad Co.*, 7 Allen, 341; *Shenk v. Propeller Co.*, 60 Pa. St. 109; *Pennsylvania R. Co. v. Stern*, 119 Pa. St. 24, 12 Atl. 756; *Wernwag v. Railroad Co.*, 117 Pa. St. 46, 11 Atl. 868; *American Merchants' Union Exp. Co. v. Milk*, 73 Ill. 224; *Ela v. Express Co.*, 29 Wis. 611; *McCulloch v. McDonald*, 91 Ind. 240; *Merchants' Dispatch & Transp. Co. v. Merriam*, 111 Ind. 5, 11 N. E. 954; *McEwen v. Railroad Co.*, 33 Ind. 363; *Howard v. Steamboat Co.*, 83 N. C. 158; *Adams v. Blankenstein*, 2 Cal. 413; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; *Southern Exp. Co. v. Crook*, 44 Ala. 468. A carrier who makes a mistake in delivery of goods is liable in damages for any diminution in value between the date of miscarriage and the time of their coming into the hands or under the control of the consignees. *Vincent v. Rather*, 31 Tex. 77. Existence of local custom to deliver goods to person holding unindorsed bill of lading, unknown to the consignor when the goods were shipped, is no defense to an action for the value of goods so delivered. *Weyand v. Atchison, T. & S. F. Ry. Co.*, 75 Iowa, 573, 39 N. W. 899. An agent sold goods on credit. His principal sent them marked C. O. D. The carrier, on a written order of the agent, delivered the goods without receiving the cash. Held, that it was a question for the jury whether the mark "C. O. D." was notice to the carrier of the agent's want of authority. *Daylight Burner Co. v. Odlin*, 51 N. H. 56. Where consignor of goods is guilty of negligence in not properly marking their destination upon them, carriers are not liable for injuries arising from their being missent. *Congar v. Chicago & N. W. Ry. Co.*, 24 Wis. 157.

<sup>748</sup> *Price v. Railway Co.*, 50 N. Y. 213; *Winslow v. Railroad Co.*, 42 Vt. 700; *Stephenson v. Hart*, 4 Bing. 476. But see *McKean v. McIvor*, L. R. 6 Exch. 36; *Heugh v. Railroad Co.*, L. R. 5 Exch. 51.

<sup>749</sup> *American Exp. Co. v. Fletcher*, 25 Ind. 492; *American Exp. Co. v. Stack*, 29 Ind. 27; *Duff v. Budd*, 3 Brod. & B. 177. But see *Heugh v. Railroad Co.*, L. R. 5 Exch. 50.

riage of the goods is intrusted, for delivering them to A.<sup>750</sup> But if A. represents himself to be an agent of the merchant, and that he is buying for him, the carrier is liable to the seller if the goods are delivered to A. at the station to which they were consigned.<sup>751</sup>

### *Rival Claimants.*

"Ordinarily the person who delivers the goods to the company is to be treated by them as the owner, and in general his title may not be disputed by the company, or a *jus tertii* or adverse title be set up, but the goods must be delivered according to his directions, without putting him to proof of his title.<sup>752</sup> That applies, however, only where such adverse claim is not asserted by the superior claimant to the sender, but merely by the carrier's own motion.<sup>753</sup> But should the goods be the property of a third person, who is also entitled to the possession of them, and while in the custody of the company such owner should demand possession, they would be justified in delivering the goods to him.<sup>754</sup> Nor are they precluded, by reason of having received goods from a particular individual, from setting up the title of a third party, really entitled thereto, who has claimed and received the goods."<sup>755</sup> If the carrier has de-

<sup>750</sup> *Edmunds v. Transportation Co.*, 135 Mass. 283. And see *Dunbar v. Railroad Co.*, 110 Mass. 26. In most of these cases a swindler has gone into a town and opened a store under the same name as some reputable merchant of the town. The swindler then orders goods which are sent on the strength of the real merchant's commercial standing. The carrier is held not liable for a delivery to the swindler. *Samuel v. Cheney*, 135 Mass. 278; *The Drew*, 15 Fed. 826; *Bush v. Railroad Co.*, 3 Mo. App. 62; *Wilson v. Express Co.*, 27 Mo. App. 360. See *Pacific Exp. Co. v. Shearer*, 160 Ill. 215, 43 N. E. 816.

<sup>751</sup> *Edmunds v. Transportation Co.*, 135 Mass. 283.

<sup>752</sup> *Sheridan v. New Quay Co.*, 4 C. B. (N. S.) 618; *Lacouch v. Powell*, 3 Esp. 115.

<sup>753</sup> *Wells v. Express Co.*, 55 Wis. 23, 11 N. W. 537, 12 N. W. 411.

<sup>754</sup> *Western Transp. Co. v. Barber*, 56 N. Y. 541; *Bates v. Stanton*, 1 Duer. 79; *Floyd v. Bovard*, 6 Watts & S. (Pa.) 75; *King v. Richards*, 6 Whart. (Pa.) 418; *The Idaho*, 93 U. S. 575; *Rosenfield v. Express Co.*, 1 Woods, 131, Fed. Cas. No. 12,060; *Great Western Ry. Co. v. Crouch*, 3 Hurl. & N. 183; *Bearings v. Bayne*, 5 Hurl. & N. 296; *Taylor v. Plumer*, 3 Maule & S. 562. A refusal to deliver would constitute a conversion. *Shellenberg v. Railroad Co.*, 45 Neb. 487, 63 N. W. 859.

<sup>755</sup> *Redm. Carr.* 100; *Sheridan v. New Quay Co.*, 4 C. B. (N. S.) 618; *Hardman v. Willcock*, 9 Bing. 382; *Biddle v. Bond*, 6 Best & S. 225; *Cheesman v. Exall*, 6 Exch. 341; *Dixon v. Yates*, 5 Barn. & Adol. 340; *American Exp. Co.*

livered the goods, according to the terms of the contract of carriage, before the real owner claims them, the carrier is not liable.<sup>756</sup> The principles applicable to this branch of the subject have already been discussed in connection with other bailments.<sup>757</sup>

*Stoppage in Transitu.*

A carrier is excused for nondelivery if the vendor of the goods exercises the right of stoppage in transitu.<sup>758</sup> This right exists whenever an unpaid vendor learns of the insolvency of the consignee before the goods have been delivered to the latter.<sup>759</sup> The carrier is not, however, bound to ascertain, at his peril, the fact of the consignee's insolvency.<sup>760</sup> The assertion of Mr. Hutchinson<sup>761</sup> to the contrary is directly opposed to the cases which he cites,<sup>762</sup> and of the text writer<sup>763</sup> cited. Toulmin, J., in *The Vidette*,<sup>764</sup> says: "I have found but one authority, and that a text writer, (Blackb. Sales), which holds that the carrier delivers the goods to the vendor at his peril, and would probably be responsible to the vendee therefor if the stoppage was wrongful. But I have found

*v. Greenhalgh*, 80 Ill. 68; *Young v. Railway Co.*, 80 Ala. 100; *Wolfe v. Railway Co.*, 97 Mo. 473, 11 S. W. 49. To justify delivery to the true owner, contrary to or without the shipper's orders, the carrier has the burden of proving the ownership and immediate right of possession in the person to whom such delivery is made. *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 11 S. W. 49.

<sup>756</sup> *Sheridan v. New Quay Co.*, 4 C. B. (N. S.) 618.

<sup>757</sup> *Ante*, p. 32.

<sup>758</sup> *Hutch. Carr.* (2d Ed.) § 409; *McFetridge v. Piper*, 40 Iowa. 627; *Reynolds v. Railroad*, 43 N. H. 580; *Newhall v. Vargas*, 13 Me. 93.

<sup>759</sup> *Rowley v. Bigelow*, 12 Pick. 307, 313; *Durgy Cement & Umber Co. v. O'Brien*, 123 Mass. 12; *Seymour v. Newton*, 105 Mass. 272; *Muller v. Pondir*, 55 N. Y. 325; *Gossler v. Schepeler*, 5 Daly, 476; *Gwyn v. Railroad Co.*, 85 N. C. 429; *Benedict v. Schaettle*, 12 Ohio St. 515; *Reynolds v. Railroad*, 43 N. H. 580; *Loeb v. Peters*, 63 Ala. 243; *Secomb v. Nutt*, 14 B. Mon. (Ky.) 324; *Millard v. Webster*, 54 Conn. 415, 8 Atl. 470. For a case where the right does not exist, see *Lester v. Railroad Co.*, 73 Hun, 398, 26 N. Y. Supp. 206.

<sup>760</sup> *The Vidette*, 34 Fed. 396; *The E. H. Pray*, 27 Fed. 474; *Allen v. Railroad Co.*, 79 Me. 327, 9 Atl. 895; *Blommingdale v. Railroad Co.*, 6 Lea (Tenn.) 616; *The Tigress*, Brown & L. 45.

<sup>761</sup> *Carriers* (2d Ed.) § 421.

<sup>762</sup> *The Vidette*, 34 Fed. 396; *The E. H. Pray*, 27 Fed. 474.

<sup>763</sup> Blackb. Sales, 266.

<sup>764</sup> 34 Fed. 396.

no case where a court has followed this rule." A notice to the carrier not to deliver the goods is a sufficient exercise of the right. It is not necessary that the vendor or his agent should demand a delivery of the goods to himself.<sup>765</sup> The carrier can excuse nondelivery on the ground of stoppage in transitu only when the notice of stoppage was given during the course of transit.<sup>766</sup> For this purpose the transit is deemed to continue until "(a) the buyer, or his agent in that behalf, takes delivery of the goods from the carrier, either before or after their arrival at the appointed destination;<sup>767</sup> or (b) after the arrival of the goods at their appointed destination the carrier attorns to the buyer, and continues in possession as bailee for the buyer;<sup>768</sup> or (c) the carrier wrongfully

<sup>765</sup> Bell v. Moss, 5 Whart. (Pa.) 189; Reynolds v. Railroad, 43 N. H. 580; Allen v. Railroad Co., 79 Me. 327, 9 Atl. 895; Newhall v. Vargas, 13 Me. 93; Jones v. Earle, 37 Cal. 630; Rucker v. Donovan, 13 Kan. 190; Ex parte Watson, 5 Ch. Div. 35; Lett v. Cawley, 1 Taunt. 606; Whitehead v. Anderson, 9 Mees. & W. 518, 532.

<sup>766</sup> Schotsmans v. Railroad Co., 3 Ch. App. 332. Cf. Rawley v. Bigelow, 12 Pick. (Mass.) 307.

<sup>767</sup> Seymour v. Newton, 105 Mass. 272; Kingman v. Denison, 84 Mich. 608, 48 N. W. 26; White v. Mitchell, 38 Mich. 390; Jenks v. Fulmer, 160 Pa. St. 527, 28 Atl. 841; Grive v. Dunham, 60 Iowa, 108, 14 N. W. 130; Symms v. Schotten, 35 Kan. 310, 10 Pac. 828; Whitehead v. Anderson, 9 Mees. & W. 518; Crawshay v. Eades, 1 Barn. & C. 182; Bolton v. Railway Co., L. R. 1 C. P. 431; James v. Griffin, 2 Mees. & W. 623.

<sup>768</sup> McPettridge v. Piper, 40 Iowa, 627; Langstaff v. Stlx, 64 Miss. 171, 1 South. 97; Williams v. Hodges, 113 N. C. 36, 18 S. E. 83; James v. Griffin, 2 Mees. & W. 623; Ex parte Cooper, L. R. 11 Ch. Div. 68. There is no constructive possession on the part of the vendee, unless the relation in which the carrier stood before, as a mere instrument of conveyance to an appointed place of destination, has been altered by a contract, between the vendee and the carrier, that the latter should hold or keep the goods as the agent of the vendee. Foster v. Frampton, 6 Barn. & C. 107; Whitehead v. Anderson, 9 Mees. & W. 518; Reynolds v. Railroad, 43 N. H. 580. Such is the relation when the consignee calls for the goods, and the carrier agrees that he will hold them for him. Richardson v. Goss, 3 Bos. & P. 119, 127; Scott v. Pettit, 3 Bos. & P. 469; Morley v. Hay, 3 Man. & R. 396; Rowe v. Pickford, 1 Moore, 526; Allan v. Gripper, 2 Crompt. & J. 218. Or where the consignee has been in the habit of using the warehouse of the carrier or wharfinger as his own. Tucker v. Humphrey, 4 Bing. 516, 521; Foster v. Frampton, 6 Barn. & C. 107, 109. But where the goods remain in the actual possession of the carrier without fault on his part (Crawshay v. Eades, 4 Barn. & C. 181; Tucker v.

refuses to deliver the goods to the buyer or his agent in that behalf." <sup>769</sup> But when the goods are represented by a bill of lading a notice of stoppage will not excuse the carrier from delivering them to an assignee <sup>770</sup> for value <sup>771</sup> before the right is exercised. <sup>772</sup>

*Excepted Perils.*

If, for any reason, the carrier is not liable for goods which have been lost, there is, of course, no liability for nondelivery. These excepted perils, including limitation of liability by special contract, have already been discussed. <sup>773</sup>

Humphrey, 4 Bing. 516; Holst v. Pownal, 1 Esp. 240; Lackington v. Atherton, 8 Scott, N. R. 38; Stoveld v. Hughes, 14 East, 308; or in the hands of a depository, or in the custom-house till the duties are paid (Mottram v. Heyer, 5 Denio, 629; Newhall v. Vargas, 13 Me. 93, 109; Northey v. Field, 2 Esp. 613); or until necessary papers are produced (Donath v. Broomhead, 7 Pa. St. 301); or while the vessel is lying in quarantine (Holst v. Pownal, 1 Esp. 240),—there is no delivery, either actual or constructive.

<sup>769</sup> Bird v. Brown, 4 Exch. 786.

<sup>770</sup> Newhall v. Railroad Co., 51 Cal. 345; Loeb v. Peters, 63 Ala. 243; Cum-  
ing v. Brown, 9 East, 506; Salomons v. Nissen, 2 Term R. 674, 681. But see  
Pattison v. Culton, 33 Ind. 240; Vertue v. Jewell, 4 Camp. 31; Stanton v.  
Eager, 16 Pick. 467.

<sup>771</sup> St. Paul Roller-Mill Co. v. Great Western Dispatch Co., 27 Fed. 434;  
Lesassier v. The Southwestern, 2 Woods, 35, Fed. Cas. No. 8,274; Lee v.  
Kimball, 45 Me. 172; Loeb v. Peters, 63 Ala. 243; Leask v. Scott, 2 Q. B.  
Div. 376.

<sup>772</sup> Walter v. Ross, 2 Wash. C. C. 283, Fed. Cas. No. 17,122; Castanola v.  
Railroad Co., 24 Fed. 267, and note. But see Clapp v. Sohmer, 55 Iowa, 273,  
7 N. W. 639; Kemp v. Falk, 7 App. Cas. 573.

<sup>773</sup> Ante, pp. 351, 413.

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POST-OFFICE DEPARTMENT.

99. The post-office department is a carrier of the mail, but, being a branch of the government, cannot be sued for losses occurring in transmission.
100. Postmasters and other officials of the department are liable for losses sustained by individuals only—
- (a) For their own negligence or misconduct (p. 485).
  - (b) For negligence in selecting subordinates, or in supervising their conduct (p. 487).
  - (c) For the acts of their private servants, who are not agents of the government (p. 487).

Common carriers may transport the same matter as is carried in the United States mails, and for losses or injuries to such matter the carrier would be responsible in the same degree as for other property carried.<sup>775</sup> But mail matter may also be carried by persons who are not common carriers. If this is done gratuitously, they become bailees for the sole benefit of the bailor, and bound to the exercise of only slight diligence.<sup>776</sup> If the carrier receives compensation, the bailment is one for hire, and the liabilities of a bailee for hire attach; that is, the carrier is bound to use ordinary care.<sup>777</sup>

The business of transporting mail matter by private persons is, however, limited to carrying by special trips; for Rev. St. U. S. § 3982, provides that "no person shall establish any private express for the conveyance of letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips or at stated periods, over any post-route which is or may be established by law, or from any city, town, or place to any other city, town, or place between which the mail is regularly carried."<sup>778</sup> The purpose of this

<sup>775</sup> See ante, p. 351.

<sup>776</sup> See ante, p. 302.

<sup>777</sup> See ante, p. 302.

<sup>778</sup> See, also, Rev. St. U. S. §§ 3983-3991. The exceptions to this statute are: (1) When the carrying is gratuitous. *Id.* § 3992. (2) When the letter is inclosed in a sealed stamped envelope with as much postage thereon as would be charged if the letter was carried in the mail. *Id.* § 3993.

enactment is to prevent competition with the post-office department.<sup>779</sup> This department is a branch of the government, instituted for public convenience. The government of the United States has undertaken the business of conducting the transmission and distribution and delivery of all mail matter. The government is the carrier of the mails. It carries them by the aid of agents it contracts with for this service. Contractors for carrying the mail are the agents of the government in the business undertaken by them. The sender of mail matter has no contract with the carrier of the mail bags, and does not commit his mail matter to him, but to the government, which has undertaken to receive, carry, and deliver it. The contractor for carrying the mail is neither a common carrier nor a private carrier. He does not carry for individuals, nor receive any compensation from them. He has no knowledge of the mail matter he carries, and no control over it, except to obey the instructions of the post-office department. Letters and packets are inclosed in government mail bags, secured by locks provided by the government, and at all times subject to the supervision and control of the officers and agents of the government in the post-office department, who may open the mail bags, and inspect the mail matter they contain, at will. Contractors for carrying the mail are instruments of government, whereby it performs the function of transmitting mail matter from place to place in the execution of this part of its business. A railroad company is not transformed into a common carrier, as to the mails, because, being engaged in the regular business of transporting goods for the public, it is at the same time carrying the mails by direction and employment of the proper department of the government. The occupation of the company is of a dual character. It is acting in two capacities, created and regulated by separate and distinct contracts and employments.<sup>780</sup>

*Liability of Post-Office Department as a Carrier.*

It is unnecessary to decide what is the actual relation of the post-office department to those who employ its agencies for the transmis-

<sup>779</sup> U. S. v. Bromley, 12 How. 88; Blackham v. Gresham, 16 Fed. 609; U. S. v. Easson, 18 Fed. 590.

<sup>780</sup> Central Railroad & Banking Co. v. Lampley, 76 Ala. 357.

sion of mail matter, because the department is a branch of government, and consequently cannot be sued without its consent.<sup>781</sup> On this point Mr. Schouler says: <sup>782</sup> "Should a common law country ever submit to a legal exposition the rightful standard of government responsibility to individual bailors as a mail carrier, the courts would not probably reckon this at the extraordinary standard of a common carrier (since widely different considerations of public policy apply), but, rather, at that of ordinary bailees for hire; while perhaps, were it made to appear, from public tables, that the postage charged the injured individual served not for actual recompense in the bailment, but merely to help defray the necessary costs of a transportation which government carried on at a loss for the benefit of the public, the standard would fall to the register of gratuitous bailment. But that a bailment duty of some sort coexists on the part of government, apart from the adequate means of enforcing it, we cannot reasonably doubt."

*Liability of Postmasters.*

"In so far as a public officer or institution executes the authority or performs the functions of the government, the exemption of the state for wrong applies to him."<sup>783</sup> This rule is applied to postmasters and other persons employed in the post-office department. But a postmaster is liable to a person injured by his negligence or misconduct, and for the acts of a clerk or deputy authorized by him.<sup>784</sup>

<sup>781</sup> 1 Jagg. Torts, 110; *Murdock Parlor Grate Co. v. Com.*, 152 Mass. 28, 24 N. E. 854; *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240; *Langford v. U. S.*, 101 U. S. 341; *Gibbons v. U. S.*, 8 Wall. 269; *Hill v. U. S.*, 149 U. S. 593, 13 Sup. Ct. 1011; *German Bank of Memphis v. U. S.*, 148 U. S. 573, 13 Sup. Ct. 702; *Schillinger v. U. S.*, 155 U. S. 163, 15 Sup. Ct. 85.

<sup>782</sup> Bailments (2d Ed.) § 269.

<sup>783</sup> 1 Jagg. Torts, 126.

<sup>784</sup> *Dunlop v. Munroe*, 7 Cranch, 242; *Maxwell v. M'Ilvoy*, 2 Bibb (Ky.) 211; *Danforth v. Grant*, 14 Vt. 283; *Stock v. Harris*, 5 Burrows, 2709; *Rowning v. Goodchild*, 3 Wils. 443; *Wiggins v. Hathaway*, 6 Barb. 632. A postmaster may be liable for charging letter postage on a newspaper. *Teall v. Felton*, 1 N. Y. 537, affirmed 12 How. 284. If a clerk at the post office receives from J. S. a letter containing money, to be sent by mail as a registered letter, under a mutual mistaken belief that letters can be registered to the

The responsibility of a postmaster for money or letters received by him in his official character is not that of a common carrier. Proof that letters containing money were delivered to him for registration, or to an assistant in his presence and by his direction, and of the loss of the letters and money, without more, is not sufficient to authorize a recovery. The burden is on the plaintiff to affirmatively show culpable negligence, and such a state of facts as to authorize the jury to attribute the loss to such negligence. It is sufficient that the jury are reasonably satisfied that the defendant did not exercise that care and prudence in the discharge of his duties in regard to the letters as a reasonable and prudent man would in regard to his own business, and that such neglect was the cause of the loss or injury.<sup>785</sup> As to a postmaster's liability for acts of subordinates not authorized, the leading case is *Lane v. Cotton*,<sup>786</sup> decided in 1701. That action was case against the defendant, as postmaster general of England, for negligence in the execution of his office. It appeared, in a special verdict, that a letter of the plaintiff's, containing eight exchequer bills, was deposited in the post office in London, which was in charge of the defendant's deputy, and the letter was opened in the office, by some person unknown, and the bills taken away. It was held by three judges, against an elaborate dissenting opinion of Lord Holt, that the defendants were not liable for the defaults of the other officers and agents of the post office, on the ground that the post office was an institution of the government, established and regulated by law; that all the officers and agents of the post office were officers and agents of the government, and not the agents and servants of the postmaster; that no contract was made by the postmaster, or any officer or agent of the post office, with those who use the public accommodation of the office; that each officer and agent was liable,

place to which it is addressed, and then, on discovering the mistake, sends it by mail unregistered, by direction of his superior officer, and it is lost, they are liable to J. S. for its value. *Fitzgerald v. Burrill*, 106 Mass. 446. As to liability of a postmaster for property turned over to the Confederate government, see *U. S. v. Morrison*, Chase, 521, Fed. Cas. No. 15,817.

<sup>785</sup> *Ralsler v. Oliver*, 97 Ala. 710, 12 South. 238; *Christy v. Smith*, 23 Vt. 663; *Danforth v. Grant*, 14 Vt. 283; *Wiggins v. Hathaway*, 6 Barb. 632.

<sup>786</sup> 1 Ld. Raym. 646, 12 Mod. 472, 1 Salk. 17.

in a proper form of action, to any individual who had suffered by his neglect of duty, but that no officer or agent was liable for the default of another. This case has been followed, and the rule is now well settled that a postmaster is not responsible for the defaults or misfeasance of his clerks or assistants, although appointed by him and under his control, unless it be shown that the postmaster was negligent in not exercising proper care and prudence in the selection of suitable and competent persons to perform the duties of clerks or deputy assistants, or unless it be shown that the postmaster himself was negligent in the duty resting upon him,—to properly superintend such clerks or assistants in the performance of the particular acts or duty, the doing of which, or the omission to do which, caused the loss and injury.<sup>787</sup> The exemption from liability of the postmaster for the defaults and misfeasance of his clerks and subassistants is available to the postmaster only in cases where such clerks or subassistants are appointed in pursuance of some law expressly authorizing it, so that, by virtue of the law and the appointment, the appointees become, in some sort, public officers themselves. The rules and regulations of the post-office department provide for employment of clerks and assistants, when necessary for a proper and speedy discharge of the business of the office; and, when made in pursuance of such rules and regulations, the postmaster himself is not responsible for the defaults of his clerks and assistants, unless, under proper averments, it be shown there was negligence in their selection or superintendence, as stated above. But a postmaster who employs a clerk or assistant, independent of express authority, and who is paid by him out of his own salary or means, is liable for the default or misfeasance of his clerk or assistant, as any private person would be for the acts of his agent or employé. The doctrine of respondeat superior applies in such cases.<sup>788</sup> But as to what acts

<sup>787</sup> *Hutchins v. Brackett*, 2 Fost. (N. H.) 252; *Whitfield v. Le Despencer*, 2 Cowp. 754; *Dunlop v. Munroe*, 7 Cranch, 242; *Schroyer v. Lynch*, 8 Watts, 453; *Bishop v. Williamson*, 11 Me. 495; *Story, Ag. § 319a*; *Story, Bailm. § 463*; *Wilson v. Peverly*, 1 Am. Lead. Cas. 778, 785; *Wiggins v. Hathaway*, 6 Barb. 632; *Keenan v. Southworth*, 110 Mass. 474; *Whart. Neg. § 292*; *Bolan v. Williamson*, 1 Brev. (S. C.) 181; *Id.*, 2 Bay, 551.

<sup>788</sup> *Raisler v. Oliver*, 97 Ala. 710, 12 South. 235; *Bishop v. Williamson*, 11



is a bill of lading  
is a receipt and a  
contract

of such a servant or agent the postmaster will be liable for is to be determined, as in other cases of master and servant, by the course of employment.<sup>789</sup>

*Liability of Contractors for Carrying the Mails.*

Like postmasters, contractors for carrying the mail are responsible for their own misfeasances, but not for those of their assistants. The assistants must answer for themselves. The only security for the safe transmission of packages by mail is the safeguards thrown around it by the regulations of the government, which announces that all valuables sent by mail shall be at the risk of the owner. All that the government promises, in case of loss of money or other valuables from the mail, is to endeavor to recover it and to punish the offender.<sup>790</sup> The duty of contractors to carry the mail is to carry it from place to place, subject to the regulations of the post-office officials. Their obligation is to the government. They and their assistants are agents of the government, and subject to the rule of law applicable in such cases.<sup>791</sup> A rider or driver employed by the contractor for carrying the mails is an assistant about the business of the government. Although employed and paid, and liable to be discharged at pleasure, by the contractor, the rider or driver is not engaged in the private service of the contractor, but is employed in the public service, and therefore the contractor is not liable for his acts.<sup>792</sup>

Me. 495; Ford v. Parker, 4 Ohio St. 576; Christy v. Smith, 23 Vt. 663; Coleman v. Frazier, 4 Rich. (S. C.) 146.

<sup>789</sup> See Jagg. Torts, 239.

<sup>790</sup> Foster v. Metts, 55 Miss. 77; Conwell v. Voorhees, 13 Ohio, 523; Hutchins v. Brackett, 22 N. H. 252. In Sawyer v. Corse, 17 Grat. (Va.) 230, a contractor was held liable for negligence of a carrier not sworn as required by law.

<sup>791</sup> Story, Ag. §§ 313, 319a, 321; 1 Shear. & R. Neg. § 325; Central R. & B. Co. v. Lampley, 76 Ala. 357.

<sup>792</sup> Central R. & B. Co. v. Lampley, supra; U. S. v. Belew, 2 Brock. 280, Fed. Cas. No. 14,563.

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See 483

Bill of lading  
{ a receipt cannot be varied by parol evidence  
a contract cannot

## CHAPTER VIII.

## CARRIERS OF PASSENGERS.

- 101. Who are Carriers of Passengers.
- 102-103. Who are Passengers.
- 104. When Liability Attaches.
- 105. Rights and Liabilities.
- 106. Duty to Accept Passengers.
- 107. Duty to Furnish Equal Accommodations.
- 108. Right to Compensation.
- 109. Ticket as Evidence of Passenger's Rights.
- 110. Right to Make Regulations.
- 111. Liability for Delay.
- 112-113. Injuries to Passengers.
- 114. Contracts Limiting Liability.
- 115. Termination.
- 116-118. Ejection from Vehicle.
- 119. Alighting at Station.
- 120. Connecting Carriers.

## WHO ARE CARRIERS OF PASSENGERS.

101. Carriers of passengers are persons or corporations engaged in the transportation of human beings. They are: .

- (a) Public carriers of passengers, who hold themselves out to carry all proper persons who apply.
- (b) Private carriers of passengers, who carry only on special contracts.

By the term "carriers of passengers" is commonly meant public carriers of passengers, but all persons or corporations who transport persons for hire are not public carriers of passengers. Public carriers of passengers exercise a public calling, and, by so doing, have certain exceptional liabilities imposed on them to which private carriers are not subject. The latter are bound merely to the exercise of ordinary care, and to carry only for those whose employment they choose to accept. To make one a public carrier of passengers, he must engage publicly in that business, and hold

himself out to carry all proper persons who may apply. A wagoner, who occasionally carries a passenger upon his wagon as a matter of special accommodation and agreement, does not thereby become a public carrier of passengers. He only becomes such when the carrying of passengers becomes an habitual business.<sup>1</sup> One who furnishes horses and carriages for hire is not a public carrier of passengers.<sup>2</sup> When contractors for building a railroad, running a construction train, consent to take a passenger for hire on their train, they are private carriers for hire, and are only bound to exercise such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances. Such care implies a watchful attention to the working of the engine, the movement of the cars and their running gear, and a constant and vigilant lookout for the condition of the road in advance of the train.<sup>3</sup> This, as will be seen,<sup>4</sup> is less than is required of public carriers of passengers. In one case<sup>5</sup> it was said of such contractors running a construction train: "They did not hold themselves out as capable of carrying passengers safely, they had no arrangements for passenger service, and they were not required to make provisions for the protection of the road, such as are usually adopted and exacted of railroad companies. They did not own the road, and had no interest in it, beyond its construction. It was no part of their duty to fence it in, or to cut away the bushes or weeds growing on its sides." But, when it has been customary to carry passengers upon construction trains, persons having no notice of a contrary rule of the company have a right to assume that the conductor had authority to carry persons on such trains, and that the granting of permission by him fell within his general authority as manager of the train.<sup>6</sup>

<sup>1</sup> Murch v. Railroad Corp., 29 N. H. 9.

<sup>2</sup> Stegrist v. Arnot, 10 Mo. App. 197.

<sup>3</sup> Shoemaker v. Kingsbury, 12 Wall. 369.

<sup>4</sup> Post, p. 517.

<sup>5</sup> Shoemaker v. Kingsbury, 12 Wall. 369. And see Nashville & C. R. Co. v. Messino, 1 Sneed (Tenn.) 220; Murch v. Railroad Corp., 29 N. H. 9; Elkins v. Railroad Co., 23 N. H. 275.

<sup>6</sup> St. Joseph & W. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461. But see Ev-

*Who have been Held Public Carriers.*

The principal classes of public carriers of passengers are proprietors of omnibuses<sup>7</sup> or stagecoaches,<sup>8</sup> railroad companies,<sup>9</sup> street-car companies,<sup>10</sup> steamboat companies, and other carriers by water who transport passengers,<sup>11</sup> including ferry men.<sup>12</sup>

*Same—Passengers on Freight Trains, etc.*

A public carrier of passengers is not necessarily such as to all the conveyances operated by it. Thus, a railroad company, though it holds itself out to carry passengers, is not bound to carry them upon its hand cars,<sup>13</sup> pay cars,<sup>14</sup> nor, in all cases, upon its freight trains.<sup>15</sup> When a railroad company makes other suitable provision for passenger travel, no one has the right to demand that he shall be allowed to ride in its trains devoted exclusively to the carrying of freight. If a person, in violation of such regulation, and without the consent of the company, forces himself into one of its freight trains, the company cannot be held responsible to him in its character as a carrier of passengers. The person who thus contributes to the injury which he might sustain while thus wrongfully in the train cannot maintain an action against the

ansville & R. R. Co. v. Barnes, 137 Ind. 306, 36 N. E. 1092; Berry v. Railway Co. (Mo. Sup.) 25 S. W. 229.

<sup>7</sup> Brien v. Bennett, 8 Car. & P. 724.

<sup>8</sup> Bretherton v. Wood, 3 Brod. & B. 54; Hollister v. Nowlen, 19 Wend. 234; Bennett v. Dutton, 10 N. H. 481; Peixotti v. McLaughlin, 1 Strob. (S. C.) 468; Lovett v. Hobbs, 2 Show. 127.

<sup>9</sup> Hanley v. Railroad Co., 1 Edm. Sel. Cas. (N. Y.) 359; Eaton v. Railroad Co., 11 Allen, 500; McElroy v. Railroad Corp., 4 Cush. (Mass.) 400; New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 660; Union Pac. Ry. Co. v. Nichols, 8 Kan. 505; Nashville & C. R. Co. v. Messino, 1 Sneed (Tenn.) 229.

<sup>10</sup> Holly v. Railroad, 61 Ga. 215; Chicago City Ry. Co. v. Munford, 97 Ill. 560; Isaacs v. Railroad Co., 47 N. Y. 122.

<sup>11</sup> White v. McDonough, 3 Sawy. 311, Fed. Cas. No. 17,552; Benett v. Steamboat Co., 6 C. B. 775, 16 C. B. 29; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 5,258.

<sup>12</sup> Le Barron v. East Boston Ferry Co., 11 Allen, 312; Slimmer v. Merry, 23 Iowa, 90.

<sup>13</sup> Hoar v. Railroad Co., 70 Me. 65.

<sup>14</sup> Southwestern R. R. v. Singleton, 66 Ga. 252.

<sup>15</sup> Jenkins v. Railway Co., 41 Wis. 112; Gardner v. New Haven & N. R. Co., 51 Conn. 143.

company for such injury.<sup>16</sup> It may be true, where a railroad company habitually permits passengers to travel on its freight trains, notwithstanding it may by regulation prohibit it, that the company will incur the same responsibility to such passengers as if they were on the regular passenger cars.<sup>17</sup> But when it is shown that the regulations of the company absolutely forbid passengers riding on freight trains, and where there are no cars attached to such trains except those ordinarily accompanying trains exclusively for freight, or such as, by their appearance and manner in which they are fitted up, could not be properly regarded as inviting passengers into the train, the burden of proving that a person was justified in going upon such train as a passenger properly devolves upon those who sue for damages resulting from injuries sustained by him while on such train.<sup>18</sup> The presumption of law is that persons riding upon trains of a railroad carrier which are manifestly not designed for the transportation of persons are not lawfully there; and, if they are permitted to be there by the consent of the carrier's employes, the presumption is against the authority of the employes to bind the carrier by such consent. But such presumption may be overthrown by special circumstances; as where the railroad company would derive a benefit from the presence of drovers upon its cattle trains, and its employes in charge of such trains invite or permit drovers to accompany their cattle, the presumption against a license to the person thus carried may be overthrown.<sup>19</sup> By making a portion of its freight trains lawful passenger trains, a railroad company, so far as the public is concerned, apparently gives the conductors of all its freight trains authority

<sup>16</sup> *Eaton v. Railroad Co.*, 57 N. Y. 382; *Houston & T. C. Ry. Co. v. Moore*, 49 Tex. 31; *Arnold v. Railroad Co.*, 83 Ill. 273; *Thomas v. Railway Co.*, 72 Mich. 355, 40 N. W. 463; *Murch v. Railroad Corp.*, 29 N. H. 9; *Hobbs v. Railway Co.*, 49 Ark. 357, 5 S. W. 586; *Louisville & N. R. Co. v. Hailey*, 94 Tenn. 383, 29 S. W. 367; *San Antonio & A. P. Ry. Co. v. Lynch* (Tex. Civ. App.) 28 S. W. 252. And see *Illinois Cent. R. Co. v. Nelson*, 59 Ill. 110.

<sup>17</sup> *Houston & T. C. Ry. Co. v. Moore*, 49 Tex. 31; *Lucas v. Railway Co.*, 33 Wis. 41; *Dunn v. Railway Co.*, 58 Me. 187; *Alabama G. S. R. Co. v. Yarbrough*, 83 Ala. 238, 3 South. 447; *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Burke v. Railway Co.*, 51 Mo. App. 491.

<sup>18</sup> *Houston & T. C. Ry. Co. v. Moore*, 49 Tex. 31.

<sup>19</sup> *Waterbury v. Railroad Co.*, 17 Fed. 671.



to carry passengers;<sup>20</sup> and, if any such conductor has orders not to carry passengers upon his train, they are in the nature of secret instructions limiting his apparent authority, and third persons are not bound by such instructions without notice.<sup>21</sup>

# WHO ARE PASSENGERS.

102. All persons are passengers who ride with the carrier's assent, express or implied.

**EXCEPTION**—Except those in the service of the carrier (p. 496).

103. Payment of the transportation is not necessary to impose upon the carrier the extraordinary liabilities of a public carrier of passengers (p. 497).

A common carrier of passengers is bound to exercise extraordinary care towards its passengers, and is liable for slight negligence,<sup>22</sup> but it does not owe the same degree of care to a person on one of its vehicles or trains who does not stand in the relation of a passenger.<sup>23</sup> As was seen in the discussion of who are carriers of passengers, in the preceding section, persons who are being transported by such carriers can claim the exceptional protection thrown around passengers only when riding on certain vehicles of the carrier.<sup>24</sup> In this section nothing will be said of the time at which one becomes a passenger.<sup>25</sup> The only questions to be considered here are the persons who are protected, as passengers, while riding on the trains or other conveyances of the carrier. The most usual case, of course, is where a person pays his fare, and

<sup>20</sup> *Dunn v. Railway Co.*, 58 Me. 187; *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Brown v. Railroad Co.*, 38 Kan. 634, 16 Pac. 942; *Wagner v. Railway Co.*, 97 Mo. 512, 10 S. W. 486; *Texas & P. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

<sup>21</sup> *Lawson v. Railway Co.*, 64 Wls. 447, 456, 24 N. W. 618; *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Illinois Cent. R. Co. v. Axley*, 47 Ill. App. 307.

<sup>22</sup> Post, p. 517.

<sup>23</sup> *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461.

<sup>24</sup> Ante, p. 491.

<sup>25</sup> See post, p. 499.

is accepted by the carrier as a passenger, and carried as such. But transportation need not be the main object sought, nor need the carrier receive compensation directly from the person carried. Thus, employés of the post-office department, carried under contract between the carrier and the government, or under a statutory duty imposed upon the carrier;<sup>26</sup> express messengers;<sup>27</sup> venders of newspapers, refreshments, etc.;<sup>28</sup> a popcorn seller who agreed to supply the passengers with ice water, as a part of the compensation for his carriage;<sup>29</sup> a person leasing a room on a boat for the sale of liquor and cigars on his own account,<sup>30</sup>—have all been held to be passengers. And so have soldiers carried under a contract with the government,<sup>31</sup> and a servant whose fare is paid by his master.<sup>32</sup> The fact that the passenger is traveling on Sunday, in a state where such travel is illegal, will not relieve the carrier of its liability.<sup>33</sup> And one who takes the wrong train by mistake is nevertheless a passenger.<sup>34</sup>

There are certain classes of persons who are not passengers whom the carrier is bound to protect, the same as those who are passengers. The carrier owes this duty when it transports in its vehicles passengers of another carrier,<sup>35</sup> or furnishes motive power

<sup>26</sup> *Pennsylvania R. Co. v. Price*, 96 Pa. St. 256; *Nolton v. Railroad Corp.*, 15 N. Y. 444; *Seybolt v. Railroad Co.*, 95 N. Y. 562; *Hammond v. Railroad Co.*, 6 S. C. 130; *Houston & T. C. Ry. Co. v. Hampton*, 64 Tex. 427; *Arrow-smith v. Railroad Co.*, 57 Fed. 165; *Collett v. Railway Co.*, 16 Q. B. 984.

<sup>27</sup> *Blair v. Railway Co.*, 66 N. Y. 313; *Chamberlain v. Railroad Co.*, 11 Wis. 238. Cf. *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Yeomans v. Navigation Co.*, 44 Cal. 71; *San Antonio & A. P. Ry. Co. v. Adams*, 6 Tex. Civ. App. 102, 24 S. W. 839.

<sup>28</sup> *Com. v. Vermont & M. R. Co.*, 108 Mass. 7; *Yeomans v. Navigation Co.*, 44 Cal. 71.

<sup>29</sup> *Com. v. Vermont & M. R. Co.*, 108 Mass. 7.

<sup>30</sup> *Yeomans v. Navigation Co.*, 44 Cal. 71.

<sup>31</sup> *Truex v. Railway Co.*, 4 Lans. (N. Y.) 198.

<sup>32</sup> *Marshall v. Railway Co.*, 11 C. B. 655.

<sup>33</sup> *Carroll v. Railroad Co.*, 58 N. Y. 126.

<sup>34</sup> *Lake Shore & M. S. Ry. Co. v. Rosenzweig*, 113 Pa. St. 519, 6 Atl. 545; *Ham v. Canal Co.*, 142 Pa. St. 617, 21 Atl. 1012; *Patry v. Railway Co.*, 77 Wis. 218, 46 N. W. 56; *Lewis v. Canal Co.*, 145 N. Y. 508, 40 N. E. 248.

<sup>35</sup> *Foulkes v. Railway Co.*, 4 C. P. Div. 267, 5 C. P. Div. 157; *Reynolds v. Railway Co.*, 2 Rosc. N. P. Ev. 735; *Dalyell v. Tyrer*, 28 Law J. Q. B. 52;

for their transportation.<sup>36</sup> The rule is the same as to the servants of another company,<sup>37</sup> such as persons in charge of a private car<sup>38</sup> or of a palace or sleeping car.\*

*Trespassers and the Like.*

It is manifest that if a person were stealthily to get upon the conveyance of a carrier, and secrete himself, for the purpose of passing from one place to another without payment of fare, he could not recover, if injured. In such a case his wrongful act would bar him from all right to compensation.<sup>39</sup> Such a person is a trespasser, and the carrier owes him no duty, except to abstain from willful injury.<sup>40</sup> In the same way, one who is attempting to defraud a carrier by the use of a false ticket is a trespasser, not a passenger.<sup>41</sup> Thus, one who is injured by the negligence of a rail-

Martin v. Railway Co., L. R. 3 Exch. 9; White v. Railroad Co., 115 N. C. 631 20 S. E. 191. And see Skinner v. Railway Co., 5 Exch. 787.

<sup>36</sup> Schopman v. Railroad Co., 9 Cnsh. 24; Galveston, H. & S. A. Ry. Co. v. Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64.

<sup>37</sup> Zeigler v. Railroad Co., 52 Conn. 543; Philadelphia, W. & B. R. Co. v. State, 58 Md. 372. Cf. Illinois Cent. R. Co. v. Frelka, 110 Ill. 498; Pennsylvania Co. v. Gallagher, 40 Ohio St. 637; In re Merrill, 54 Vt. 200; Brown v. Railroad Co., 40 U. C. Q. B. 333; Vose v. Railway Co., 2 Hurl. & N. 728.

<sup>38</sup> Lockhart v. Lichtenthaler, 46 Pa. St. 151, 159; Cumberland Val. R. Co. v. Myers, 55 Pa. St. 288. See Torpy v. Railway Co., 20 U. C. Q. B. 446; Lackawanna, & B. R. Co. v. Chenewith, 52 Pa. St. 382.

\* Jones v. Railroad Co., 125 Mo. 666, 28 S. W. 883. Contra, Hughson v. Railroad Co., 2 App. D. C. 98.

<sup>39</sup> Gardner v. Railroad Co., 51 Conn. 143; Hendryx v. Railroad Co., 45 Kan. 377, 25 Pac. 893; Toledo, W. & W. Ry. Co. v. Brooks, 81 Ill. 245; Chicago & A. R. Co. v. Michie, 83 Ill. 427; Chicago, B. & Q. R. Co. v. Mehlsack, 131 Ill. 61, 22 N. E. 812; Bricker v. Railroad Co., 132 Pa. St. 1, 18 Atl. 983; Haase v. Navigation Co., 19 Or. 354, 24 Pac. 238; Condran v. Railway Co., 14 C. C. A. 506, 67 Fed. 522. And see Reary v. Railway Co., 40 La. Ann. 32, 3 South. 390; Hlgley v. Gilmer, 3 Mont. 90.

<sup>40</sup> O'Brien v. Railroad Co., 15 Gray, 20; Austin v. Railway Co., L. R. 2 Q. B. 442, 446; Lygo v. Newbold, 9 Exch. 302.

<sup>41</sup> Toledo, W. & W. Ry. Co. v. Beggs, 85 Ill. 80; Lillis v. Railway Co., 61 Mo. 464; Brown v. Railway Co., Id. 536. And see Robertson v. Railroad Co., 22 Barb. 91; Gulf, C. & S. F. Ry. Co. v. Campo, 11, 76 Tex. 174, 13 S. W. 19; Prince v. Railway Co., 64 Tex. 144; McVeety v. Railway Co., 45 Minn. 268, 47 N. W. 809; Toledo, W. & W. Ry. Co. v. Brooks, 81 Ill. 245; Union Pac. Ry. Co. v. Nichols, 8 Kan. 505; Great Northern Ry. Co. v. Harrison, 10 Exch. 370.

way company while traveling on one of its trains upon a pass or ticket issued to another person, and by its terms not transferable, has no remedy against the company.<sup>42</sup> So where a person imposed himself upon the conductor as an express messenger, and obtained his consent to carry him without fare, it was held that he did not become entitled to the rights of a passenger.<sup>43</sup> And it has been held that a railway company is not liable for the accidental death of a boy permitted by the conductor, against its rules, to ride gratuitously on the train to sell newspapers.<sup>44</sup>

#### *Employes as Passengers.*

An employé of a carrier of passengers, while riding in connection with the performance of his duty, is not a passenger.<sup>45</sup> But if the employé is traveling on his own business, though he pays no fare, he is a passenger.<sup>46</sup> Where a person engaged in the construction or repair of a railroad, as a laborer working with a gravel train, or a carpenter repairing a bridge, is carried to and from his work by the company without charge, and is injured in the course of transportation by the negligence of the carrier or his servants, most cases have held that the carrier was not liable to such an employé as a passenger.<sup>47</sup> But, where a reduction in wages was

<sup>42</sup> Toledo, W. & W. Ry. Co. v. Beggs, 85 Ill. 80; Way v. Railway Co., 64 Iowa, 48, 19 N. W. 828.

<sup>43</sup> Union Pac. Ry. Co. v. Nichols, 8 Kan. 505. And see Higgins v. Railroad Co., 36 Mo. 418.

<sup>44</sup> Duff v. Railroad Co., 91 Pa. St. 458; Fleming v. Railroad Co., 1 Abb. N. C. (N. Y.) 433. A man shoveling coal for his passage by agreement with the fireman was held not a passenger. Woolsey v. Railroad Co., 39 Neb. 798, 58 N. W. 444.

<sup>45</sup> Gillshannon v. Railroad Corp., 10 Cush. (Mass.) 228; Ryan v. Railroad Co., 23 Pa. St. 384; O'Donnell v. Railroad Co., 59 Pa. St. 239; Russell v. Railroad Co., 17 N. Y. 134; Vick v. Railroad Co., 95 N. Y. 267.

<sup>46</sup> Ohio & M. R. Co. v. Muhling, 30 Ill. 9; Doyle v. Railroad Co., 162 Mass. 66, 37 N. E. 770. But see Higgins v. Railroad Co., 36 Mo. 418.

<sup>47</sup> Ryan v. Railroad Co., 23 Pa. St. 384; Gillshannon v. Railroad Corp., 10 Cush. (Mass.) 228; Seaver v. Railroad Co., 14 Gray, 466; Russell v. Railroad Co., 17 N. Y. 134; Hoar v. Railroad Co., 70 Me. 65; Tunney v. Railway Co., L. R. 1 C. P. 291; Hutchinson v. Railway Co., 6 Eng. Ry. Cas. 580. Contra, Gillenwater v. Railroad Co., 5 Ind. 339. But see Columbus & I. C. Ry. Co. v. Arnold, 31 Ind. 174, 182; Flitzpatrick v. Railroad Co., 7 Ind. 436; Kansas Pac. Ry. Co. v. Salmon, 11 Kan. 83, 14 Kan. 512.

made on account of the transportation furnished the employé, he has been held a passenger.<sup>48</sup> To employés the carrier is liable for only ordinary care, and not for the negligence of fellow servants of the employé. But to passengers the highest care is owed, and the carrier is responsible for any negligence of his servants.<sup>49</sup>

### *Gratuitous Passengers.*

In one respect there is a striking difference between the liability of common carriers for goods and the liability of public carriers of passengers for injuries to a passenger. As has been seen, where goods are carried gratuitously the carrier is not regarded as a common carrier, but is simply a private carrier, and liable, as a mandatary, only for gross negligence.<sup>50</sup> But, in respect to public carriers of passengers, public policy has imposed an entirely different rule. Even though such passengers are carried gratuitously, if they have been accepted by the carrier as passengers, all the extraordinary liabilities of the relation attach. Having admitted him to the rights of a passenger, the carrier is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to those who have paid him for the service.<sup>51</sup> Where a passenger is carried gratuitously, the liability of the carrier for an injury caused by negligence arises, not from any implied contract, but from the violation of a duty imposed by the circumstances.<sup>52</sup> Having undertaken to carry, the duty arises to carry safely.<sup>53</sup> A person in good faith accepting an invitation to ride free, given by an authorized agent, is a passen-

<sup>48</sup> O'Donnell v. Railroad Co., 59 Pa. St. 239.

<sup>49</sup> 2 Thomp. Neg. 862, 969, 972; Thomp. Carr. Pass. 46; O'Donnell v. Railroad Co., 59 Pa. St. 239.

<sup>50</sup> Ante, p. 302.

<sup>51</sup> Todd v. Railroad Co., 3 Allen, 18; Com. v. Vermont & M. R. Co., 108 Mass. 7; Littlejohn v. Railroad Co., 148 Mass. 478, 20 N. E. 103; Files v. Railroad Co., 149 Mass. 204, 21 N. E. 311; Philadelphia & R. R. Co. v. Derby, 14 How. 468; The New World v. King, 16 How. 469; Quimby v. Railroad Co., 150 Mass. 365, 368, 23 N. E. 205; Waterbury v. Railroad Co., 17 Fed. 671.

<sup>52</sup> Nolton v. Railroad Corp., 15 N. Y. 444.

<sup>53</sup> Philadelphia & R. R. Co. v. Derby, 14 How. 386; Nolton v. Railroad Corp., 15 N. Y. 444; The New World v. King, 16 How. 469; Perkins v. Railroad Co., 24 N. Y. 200; Todd v. Railroad Co., 3 Allen, 21; Jacobus v. Railway Co., 20 Minn. 125 (Gil. 110).



ger.<sup>54</sup> But if he accepts an invitation to ride free, given by an agent not having authority to invite, and in known violation of the rules of the carrier, he is not a passenger.<sup>55</sup> A master is bound by the acts of his servants in the course of his employment. They are deemed to be the acts of the master.<sup>56</sup> Thus, a driver of a horse car is an agent of the corporation having charge, in part, of the car. If, in violation of his instructions, he invites a girl to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties, but is an act within the general course of his employment, for which he is responsible to his master. If the girl is injured through the negligence of the driver, she can hold the company liable.<sup>57</sup>

The president of a railroad company, injured while riding by invitation on the line of another company, recovered from the latter for the damage sustained, though his carriage was gratuitous.<sup>58</sup> So a man riding free under a custom to carry "steamboat men" without charge can hold the owner of the vessel liable for injuries sustained;<sup>59</sup> and the same has been held of a child riding with its mother under a rule of the company which permitted children under three to travel without payment of fare.<sup>60</sup>

<sup>54</sup> Todd v. Railroad Co., 3 Allen, 18, 7 Allen, 207; Rose v. Railroad Co., 39 Iowa, 246; Jacobus v. Railway Co., 20 Minn. 125 (Gil. 110); Philadelphia & R. R. Co. v. Derby, 14 How. 468; Wilton v. Railroad Co., 107 Mass. 108; Grand Trunk R. Co. v. Stevens, 95 U. S. 655. Contra, Kinney v. Railroad Co., 34 N. J. Law, 513.

<sup>55</sup> Hoar v. Railroad Co., 70 Me. 65; Eaton v. Railroad Co., 57 N. Y. 382; Houston & T. C. Ry. Co. v. Moore, 49 Tex. 31; Waterbury v. Railroad Co., 17 Fed. 671, and note.

<sup>56</sup> Ramsden v. Railroad Co., 104 Mass. 117

<sup>57</sup> Wilton v. Railroad Co., 107 Mass. 108. And see Pittsburgh, A. & M. P. Ry. Co. v. Caldwell, 74 Pa. St. 421; New Jersey Traction Co. v. Danbech (N. J. Sup.) 31 Atl. 1038.

<sup>58</sup> Philadelphia & R. R. Co. v. Derby, 14 How. 468. But see Chicago, St. P., M. & O. R. Co. v. Bryant, 13 C. C. A. 249, 65 Fed. 969; Thompson v. Railroad Co., 47 La. Ann. 1107, 17 South. 503.

<sup>59</sup> The New World v. King, 16 How. 469.

<sup>60</sup> Austin v. Railway Co., 8 Best & S. 327, L. R. 2 Q. B. 442. In this case the child was three years and three months old, and should have paid half fare, yet a recovery was permitted.

## WHEN LIABILITY ATTACHES.

**104. A person becomes entitled to the exercise of the extreme care due a passenger as soon as he is accepted by the carrier for immediate transportation.**

As will be seen later,<sup>61</sup> a carrier is bound to exercise towards passengers a very high degree of care, while towards persons not passengers, though present at the station by invitation, express or implied, only ordinary care is due. In this way, the fixing of the time at which a person becomes entitled to the protection due a passenger is important, as it is, also, in determining which party has the burden of proving negligence in actions for injuries to passengers.<sup>62</sup>

One becomes a passenger when he puts himself into the care of the carrier to be transported under a contract, and is received and accepted as a passenger by the carrier. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad,<sup>63</sup> or other line of transportation. A railroad company holds itself out as ready to receive as passengers all persons who present themselves, in a proper condition and in a proper manner, at a proper place, to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. The question is whether the person has presented himself, in readiness to be carried, under such circumstances, in reference to time, place, manner, and condition, that the railroad company must be deemed to have accepted him as a passenger. Was his conduct such as to bring him within the invitation of the railroad

<sup>61</sup> Post, p. 517.

<sup>62</sup> See post, p. 517.

<sup>63</sup> Jones v. Railroad Co., 39 S. C. 162, 17 S. E. 698.

company? In *Dodge v. Steamship Co.*<sup>64</sup> it was said that "when one has made a contract for passage upon the vehicle of a common carrier, and has presented himself, at a proper place, to be transported, his right to care and protection begins." In this statement it was assumed that he would be in a proper condition, and present himself in a proper manner. If he should present himself while doing something which would expose himself or others to great danger from the cars or engines of the carrier, he would not be within the invitation of the railroad company, and it would not be expected to accept him as a passenger. Where an intending passenger was running rapidly, without precautions for his safety, towards a point directly in front of an incoming train, it was held that he did not put himself in readiness to be taken as a passenger, and present himself in a proper way.<sup>65</sup> The actual purchase of a ticket, or the entering of the carrier's vehicle, is not necessary to establish the relation of passenger and carrier.<sup>66</sup> Thus, a person who is injured while attempting to board a train under the direction of the servants is a passenger, whether a ticket has been purchased<sup>67</sup> or not.<sup>68</sup> Where a person was riding to a railway station in a sleigh furnished by the carrier, he was held a passenger.<sup>69</sup> If a street car or omnibus stops at the signal of an intending passenger, it will constitute an acceptance of the person as a passenger by the carrier.<sup>70</sup> One awaiting the arrival of his train is entitled to be protected as a passenger,<sup>71</sup> unless he comes to the

<sup>64</sup> 148 Mass. 207, 19 N. E. 373.

<sup>65</sup> *Webster v. Railroad Co.*, 161 Mass. 298, 37 N. E. 165.

<sup>66</sup> *Rogers v. Steamboat Co.*, 86 Me. 261, 29 Atl. 1069; *Allender v. Railroad Co.*, 37 Iowa, 264; *Gordon v. Railroad Co.*, 40 Barb. 546. But see *Gardner v. Railroad Co.*, 51 Conn. 143; *Indiana Cent. R. Co. v. Hudelson*, 13 Ind. 325.

<sup>67</sup> *Warren v. Railroad Co.*, 8 Allen, 227.

<sup>68</sup> *McDonald v. Railroad Co.*, 26 Iowa, 124; *Allender v. Railroad Co.*, 37 Iowa, 264; *Norfolk & W. R. Co. v. Groseclose's Adm'r*, 88 Va. 267, 13 S. E. 454. Contra, *Indiana Cent. R. Co. v. Hudelson*, 13 Ind. 325.

<sup>69</sup> *Buffett v. Railroad Co.*, 40 N. Y. 168. But see *June v. Railroad Co.*, 153 Mass. 79, 26 N. E. 238.

<sup>70</sup> *Smith v. Railroad Co.*, 32 Minn. 1, 18 N. W. 827; *Brien v. Bennett*, 8 Car. & P. 721. And see *McDonough v. Railroad Co.*, 137 Mass. 210; *Donovan v. Railway Co.*, 65 Conn. 201, 32 Atl. 350.

<sup>71</sup> *Grimes v. Pennsylvania Co.*, 36 Fed. 72; *Texas & P. Ry. Co. v. Best*, 66 Tex. 116, 18 S. W. 224; *Gordon v. Railroad Co.*, 40 Barb. 546; *Caswell v.*

station an unreasonable length of time before the departure of the train.<sup>72</sup> And a person who enters a train, with the carrier's consent, before it is ready to start, is a passenger.<sup>73</sup> Mr. Hutchinson<sup>74</sup> thinks "that the mere intention to take passage upon the carrier's vehicle ought not" to entitle the person to protection as a passenger. In his opinion, the rule should be as follows: "So long, therefore, as the person who merely purposes to be carried is at perfect liberty to change his mind, he is not a passenger; and, for any injury which he may sustain through the negligence of the carrier, he must seek redress as a stranger. Otherwise a liability would be imposed upon the carrier without compensation, or the right to it, and the law which would make him responsible in such a case for that utmost care which is required of the carrier of a passenger would be palpably unjust." This does not, however, seem to be the true rule, since the extreme care required of a public carrier of passengers is imposed by the law on the ground of public policy.<sup>75</sup> The carrier's right to compensation cannot be the test of his liability, since he must exercise the same degree of care towards a gratuitous and a paying passenger.<sup>76</sup> Mr. Hutchinson's view certainly is not supported by the cases.

Railroad Corp., 98 Mass. 194; Warren v. Railroad Co., 8 Allen. 227; Shannon v. Railroad Co., 78 Me. 52, 2 Atl. 678. But see Perry v. Railroad Co., 66 Ga. 746, affirming s. c., 58 Ga. 461.

<sup>72</sup> Heinlein v. Railroad Co., 147 Mass. 136, 16 N. E. 698. And see Harris v. Stevens, 31 Vt. 79.

<sup>73</sup> Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219; Lent v. Railroad Co., 120 N. Y. 467, 24 N. E. 653. And see Poucher v. Railroad Co., 49 N. Y. 263; Gardner v. Railroad Co., 94 Ga. 538, 19 S. E. 757.

<sup>74</sup> Carr. (2d Ed.) § 562.

<sup>75</sup> See post, p. 529.

<sup>76</sup> See ante, p. 497; Hutch. Carr. (2d Ed.) § 566. And see Green v. Railroad Co., 41 Iowa, 410.

*End Sat Feb 27nd*

## RIGHTS AND LIABILITIES.

105. The rights and liabilities of a public carrier of passengers will be discussed under the following heads:

- (a) Duty to accept passengers (p. 502).
- (b) Duty to furnish equal accommodations (p. 505).
- (c) Right to compensation (p. 507).
- (d) Ticket as evidence of passenger's rights (p. 510).
- (e) Right to make regulations (p. 514).
- (f) Liability for delay (p. 516).
- (g) Injuries to passengers (p. 517).
- (h) Contracts limiting liability (p. 529).

## SAME—DUTY TO ACCEPT PASSENGERS.

106. A public carrier of passengers is bound to accept for transportation all proper persons who apply, so long as he has room in his vehicle, and they are able and willing to pay for the transportation.

*Who may be Refused.*

Those who hold themselves out as public carriers of passengers are bound to take all persons who may apply for transportation over their lines.<sup>77</sup> They cannot refuse to carry persons who come part way over rival lines, though they may give preference to passengers received over lines with which they have arrangements for through transportation.<sup>78</sup> A carrier is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. There is no obligation to carry one whose ostensible business

<sup>77</sup> *West Chester & P. R. Co. v. Miles*, 55 Pa. St. 209; *Sanford v. Railroad Co.*, 2 Phila. (Pa.) 107; *Day v. Owen*, 5 Mich. 520; *Hollister v. Nowlen*, 19 Wend. 234; *Hannibal R. Co. v. Swift*, 12 Wall. 263; *Saltonstall v. Stockton*, Taney, 11, Fed. Cas. No. 12,271; *Indianapolis, P. & C. Ry. Co. v. Rinard*, 46 Ind. 293; *Lake Erie & W. R. Co. v. Acres*, 108 Ind. 548, 9 N. E. 453; *Mershon v. Hobensack*, 22 N. J. Law, 372; *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052.

<sup>78</sup> *Bennett v. Dutton*, 10 N. H. 481.



is to injure the line;<sup>79</sup> one fleeing from justice; one going upon the vehicle to assault a passenger,<sup>80</sup> commit larceny or robbery, or to interfere with the proper regulations of the company, or to commit any crime. Nor is a carrier bound to carry persons who are drunk<sup>81</sup> and disorderly,<sup>82</sup> or infected with contagious diseases.<sup>83</sup> The person must be upon lawful and legitimate business. Hence a carrier is not bound to accept persons who intend to use his vehicle for the purpose of gambling.<sup>84</sup> And a passenger may be refused if his arrival at the place of destination would excite violence and disorder.<sup>85</sup>

*Same—Using Vehicle for Traffic.*

A carrier of passengers is not bound to furnish traveling conveniences for those who wish to engage on their vehicles in the business of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage,<sup>86</sup> nor to permit the transaction of this business in their vehicles, when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their vehicles for such purposes.<sup>87</sup> A steamboat company or a railroad company may well allow an individual to open a restaurant or a bar on their conveyance, or

<sup>79</sup> Jencks v. Coleman, Fed. Cas. No. 7,258; Bennett v. Dutton, 10 N. H. 481.

<sup>80</sup> Bennett v. Dutton, 10 N. H. 481.

<sup>81</sup> Putnam v. Railroad Co., 55 N. Y. 108; Pittsburg & C. R. Co. v. Pillow, 76 Pa. St. 510. But not slight intoxication. Pittsburg, C. & St. L. R. Co. v. Vandyne, 57 Ind. 576; Putnam v. Railroad Co., 55 N. Y. 108, 114; Milliman v. Railroad Co., 66 N. Y. 642.

<sup>82</sup> Vinton v. Railroad Co., 11 Allen, 304; Pittsburg & C. R. Co. v. Pillow, 76 Pa. St. 510; Pittsburgh, F. W. & C. Ry. Co. v. Hinds, 53 Pa. St. 512; Pittsburgh, C. & St. L. R. Co. v. Vandyne, 57 Ind. 576; Flint v. Railroad Co., 34 Conn. 554.

<sup>83</sup> Thurston v. Railroad Co., 4 Dill. 321, Fed. Cas. No. 14,019.

<sup>84</sup> Id.

<sup>85</sup> Pearson v. Duane, 4 Wall. 605. But see, as to a prostitute, Brown v. Railroad Co., 7 Fed. 51.

<sup>86</sup> See ante, p. 389.

<sup>87</sup> Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Com. v. Power, 7 Metc. (Mass.) 596; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 1,030; Barney v. Steamboat Co., 67 N. Y. 301; Smallman v. Whitter, 87 Ill. 545.

to do the business of boot blacking, or of peddling books and papers. This individual is under their control, subject to their regulation, and the business interferes in no respect with the orderly management of the vehicle. But, if every one that thinks fit can enter upon the performance of these duties, the control of the vehicle and its good management would soon be at an end. The cars or boats are those of the carrier, and exclusively his, for this purpose. The sale or leasing of these rights to individuals, and the exclusion of others therefrom, come under the head of reasonable regulations, which the courts are bound to enforce. The right of transportation, which belongs to all who desire it, does not carry with it a right of traffic or of business. One violating such a rule of the carrier may be ejected from the carrier's vehicle.<sup>88</sup>

#### *Insufficient Accommodations.*

Carriers of passengers are not bound to receive any one for transportation after their accommodations are exhausted and they have no more room.<sup>89</sup> But, if the carrier sells tickets to more persons than he can carry, he is liable for breach of his contract.<sup>90</sup> So, if passengers in excess of the accommodations are received without condition, or notice of the carrier's inability to make adequate provision for their transportation, he is liable.<sup>91</sup>

#### *Prepayment of Fare.*

Carriers are bound to carry only for those who can and will pay for their transportation. This payment may be demanded in advance, as a condition of accepting a person as a passenger.<sup>92</sup>

<sup>88</sup> The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 1,030.

<sup>89</sup> Chicago & N. W. R. Co. v. Carroll, 5 Ill. App. 200; Evansville & C. R. Co. v. Duncan, 28 Ind. 441.

<sup>90</sup> The Pacific, 1 Blatchf. 569, Fed. Cas. No. 10,643; Hawcroft v. Railway Co., 8 Eng. Law & Eq. 362.

<sup>91</sup> Evansville & C. R. Co. v. Duncan, 28 Ind. 441. A carrier is bound to furnish seats for all passengers. On his failure to do so, the passenger may refuse to surrender his ticket, and leave the train, but cannot insist on being carried if he retains his ticket. Hardenbergh v. Railway Co., 39 Minn. 3, 38 N. W. 625; Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5; Davis v. Railroad Co., 53 Mo. 317; St. Louis, I. M. & S. Ry. Co. v. Leigh, 45 Ark. 368. Cf. Louisville, N. O. & T. R. Co. v. Patterson, 69 Miss. 421, 13 South. 697.

<sup>92</sup> Day v. Owen, 5 Mich. 520; Tarbell v. Railroad Co., 34 Cal. 616; Nashville & C. R. Co. v. Messino, 1 Sneed. 220; Ker v. Mcuntain, 1 Esp. 27. A

*Waiver of Right to Refuse.*

A carrier should, in the first place, refuse to sell tickets to persons whom it desires and has the right to refuse to carry, and should exclude them if they attempt to enter the vehicle without tickets. If a ticket has been inadvertently sold to such person, and the company desires to rescind the contract for transportation, it should tender a return of the money paid for the ticket. If it does not do this, the ticket holder may, under any circumstances, recover the amount he paid for the ticket.<sup>93</sup> If the carrier, at the time, knew facts which would justify a refusal to carry, selling a ticket to such a person is a waiver of the right to refuse him.<sup>94</sup>

## SAME—DUTY TO FURNISH EQUAL ACCOMMODATIONS.

**107. A public carrier of passengers is bound to furnish equal accommodations to all persons under like circumstances. But he may make reasonable discriminations, according to :**

- (a) Sex.
- (b) Kind of ticket.
- (c) Length of journey.

*Discriminations against Colored Passengers.*

Whatever rules tend to the comfort, order, and safety of the passengers, carriers are fully authorized to make, and are amply empowered to enforce compliance therewith. But such rules and regulations must always be reasonable, and uniform in respect to persons.<sup>95</sup> A railroad company cannot capriciously discriminate

strict tender of fare is not necessary. *Day v. Owen*, supra; *Nashville & C. R. Co. v. Messino*, supra; *Tarbell v. Railroad Co.*, supra; *Pickford v. Railway Co.*, 8 Mees. & W. 372.

<sup>93</sup> *Thurston v. Railroad Co.*, 4 Dill. 321, Fed. Cas. No. 14,019.

<sup>94</sup> *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 262; *Pearson v. Duane*, 4 Wall. 605; *Tarbell v. Railroad Co.*, 34 Cal. 616. But see *Com. v. Power*, 7 Metc. (Mass.) 596; *The D. R. Martin*, 11 Blatchf. 233. Fed. Cas. No. 4,092.

<sup>95</sup> When, therefore, a passenger who, under the rules of the company, is entitled to a berth upon payment of the usual fare, and to whom no personal objection attaches, enters the company's sleeping car at a proper time for the

between passengers on account of their nativity, color, race, social position, or their political or religious beliefs.<sup>96</sup> Whatever discriminations are made must be on some principle or for some reason that the law recognizes as just and equitable and founded in good public policy.<sup>97</sup> But a carrier may provide separate accommodations for white and colored passengers, and, if the accommodations provided for the colored passenger are substantially equal to those provided for white passengers, then there is no unjust discrimination.<sup>98</sup>

### *Classification of Passengers.*

Regulations of a carrier which make differences in the accommodations furnished depend upon a reasonable classification of the passengers are valid.<sup>99</sup> Thus, a carrier may provide a separate car for ladies, or for ladies and their male escorts, and exclude all

purpose of procuring accommodations, and, in an orderly and respectful manner, applies for a berth, offering or tendering the customary price therefor, the company is bound to furnish it, provided it has a vacant one at its disposal. *Nevin v. Car Co.*, 106 Ill. 222. As to nature of business carried on by sleeping-car companies, see ante, p. 262, "Innkeepers." A railroad company cannot, upon any pretense, except of wrong or misconduct on the part of the person excluded, grant to one hackman, or line of hacks and omnibuses, the exclusive right to occupy a place upon its depot grounds; nor can it set aside the most favorable part of such grounds to a hack and omnibus company engaged in carrying passengers and freight, to the exclusion of others engaged in the same business. A grant of such privilege is an unjust discrimination, tending to defeat competition, and to create a monopoly. *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 47 N. W. 667. *Montana U. Ry. Co. v. Langlois*, 9 Mont. 419, 24 Pac. 209. Contra, *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89; *Griswold v. Webb*, 16 R. I. 649, 19 Atl. 143; *In re Beadell*, 2 C. B. (N. S.) 509; *In re Painter*, Id. 702; *Hole v. Digby*, 27 Wkly. Rep. 884.

<sup>96</sup> *Coger v. Packet Co.*, 37 Iowa, 145; *Central R. Co. v. Green*, 86 Pa. St. 427; *West Chester R. Co. v. Miles*, 55 Pa. St. 209.

<sup>97</sup> *Chicago & N. W. Ry. Co. v. Williams*, 55 Ill. 185. But see *Goines v. McCandless*, 4 Phila. 255.

<sup>98</sup> *Chicago & N. W. Ry. Co. v. Williams*, 55 Ill. 185; *Houck v. Railway Co.*, 38 Fed. 226; *The Sue*, 22 Fed. 843; *Logwood v. Railroad Co.*, 23 Fed. 318; *Murphy v. Railroad Co.*, Id. 637; *Anderson v. Railroad Co.*, 62 Fed. 46. And see *Gray v. Railroad Co.*, 11 Fed. 687. But see *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445.

<sup>99</sup> *Chicago & N. W. Ry. Co. v. Williams*, 55 Ill. 185.

other passengers.<sup>100</sup> A carrier may properly provide more luxurious accommodations to passengers traveling on first-class tickets than to others,<sup>101</sup> or to persons bound for distant points.<sup>102</sup>

SAME—RIGHT TO COMPENSATION.

108. A public carrier of passengers is entitled to a reasonable compensation, which may be collected in advance. The purchase of a ticket before entering the carrier's vehicle may be required, if a sufficient opportunity to do so is afforded the passenger.

A carrier of passengers is entitled to a reasonable compensation,<sup>103</sup> which may be regulated by statute<sup>104</sup> or by usage.<sup>105</sup> The carrier must not make unreasonable discriminations between different passengers.<sup>106</sup> The principles on which these rules depend are the same as for carriers of goods, and have already been discussed.<sup>107</sup> In payment of his fare, a passenger is not required to

<sup>100</sup> Chicago & N. W. Ry. Co. v. Williams, supra; Peck v. Railroad Co., 70 N. Y. 587; Bass v. Railway Co., 36 Wis. 450, 39 Wis. 636, and 42 Wis. 654; Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5; Brown v. Railroad Co., 7 Fed. 51. And see Marquette v. Railroad Co., 33 Iowa, 562. Sufficient accommodations for other passengers must be provided elsewhere. Bass v. Railway Co., supra.

<sup>101</sup> Wright v. Railway Co., 78 Cal. 360, 20 Pac. 740. St. Louis & A. T. Ry. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711; Nolan v. Railroad Co., 41 N. Y. Super. Ct. 541.

<sup>102</sup> St. Louis & A. T. Ry. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711.

<sup>103</sup> Spofford v. Railroad Co., 128 Mass. 326; McDuffee v. Railroad Co., 52 N. H. 430; Johnson v. Railroad Co., 16 Fla. 623.

<sup>104</sup> Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155; Peik v. Railway Co., Id. 164; Ruggles v. Illinois, 108 U. S. 526, 2 Sup. Ct. 832; Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191; Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. 1028; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702; Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47; St. Louis & S. F. Ry. v. Gill, 54 Ark. 101, 15 S. W. 18. And see Wellman v. Railway Co., 83 Mich. 592, 47 N. W. 489.

<sup>105</sup> Spofford v. Railroad Co., 128 Mass. 326.

<sup>106</sup> Johnson v. Railroad Co., 16 Fla. 623; Atwater v. Railroad Co., 48 N. J. Law, 55, 2 Atl. 803; Spofford v. Railroad Co., 128 Mass. 326.

<sup>107</sup> Ante, p. 335.

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tender the exact amount. The carrier must furnish change in a reasonable amount.<sup>108</sup> As has been stated,<sup>109</sup> the carrier is entitled to payment in advance, if it is demanded. A regulation requiring passengers to present tickets before entering the cars or other vehicle is a valid one.<sup>110</sup> When a passenger has purchased a ticket, the carrier may require its surrender,<sup>111</sup> but the passenger can demand a check, or other evidence that he has paid his fare.<sup>112</sup> If a passenger loses his ticket, he must pay his fare again,<sup>113</sup> after a reasonable opportunity, is given to find the ticket.<sup>114</sup>

*Higher Fare, When Paid on Train.*

A regulation of a railroad company that all passengers who shall purchase tickets before entering the cars shall be entitled to a small discount from the advertised rates of fare, but, if such ticket is not purchased, the full rate of fare shall be charged, is a reasonable

<sup>108</sup> Barrett v. Railway Co., 81 Cal. 296, 22 Pac. 859. Cf. Fulton v. Railway Co., 17 U. C. Q. B. 428; Curtis v. Railway Co., 94 Ky. 573, 23 S. W. 363.

<sup>109</sup> Ante, p. 504.

<sup>110</sup> Dickerman v. Depot Co., 44 Minn. 433, 46 N. W. 907.

<sup>111</sup> Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; Havens v. Railroad Co., 28 Conn. 69, 88; Northern R. Co. v. Page, 22 Barb. 130; Van Dusan v. Railway Co., 97 Mich. 439, 56 N. W. 848. If the carrier's servant refuses to transport a passenger on the ticket presented by the latter, there is no right to take up the ticket, and compel the passenger to pay fare. The passenger has a right to retain the rejected ticket. Van Kirk v. Railroad Co., 76 Pa. St. 66.

<sup>112</sup> Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; State v. Thompson, 20 N. H. 250. But see Wheeler, Carr. 141.

<sup>113</sup> Standish v. Steamship Co., 111 Mass. 512; Cresson v. Railroad Co., 11 Phila. (Pa.) 597; Crawford v. Railroad Co., 26 Ohio St. 580; Atwater v. Railroad Co., 48 N. J. Law, 55, 2 Atl. 803; International & G. N. R. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 491. And see Cooper v. Railway Co., 4 Exch. Div. 88. But see Pullman Palace Car Co. v. Reed, 75 Ill. 125.

<sup>114</sup> Maples v. Railroad Co., 38 Conn. 557; Knowles v. Railroad Co., 102 N. C. 59, 9 S. E. 7; International & G. N. R. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 491. The carrier has no right to imprison a passenger for his refusal to pay fare. Lynch v. Railroad Co., 90 N. Y. 77. As to a lien on the passenger's baggage, see ante, p. 343. If it is custom of carriers by steamboat to collect passage tickets as passengers are leaving boat and passenger attempts to land without ticket, alleging that he has lost it, carriers have right to detain him for a reasonable time, to inquire on spot into circumstances of case. Standish v. Steamship Co., 111 Mass. 512.

one,<sup>115</sup> and in no way violates a statute which provides that rates shall be the same for all persons between the same points.<sup>116</sup> Such a regulation tends to protect the corporation from the frauds of its conductors, and from the inconvenience of collecting fares upon its trains in motion, and it imposes no hardship whatever upon travelers. But if the corporation refuses to furnish the tickets, and thus fails to do what is plainly implied by the adoption and publication of the rule, passengers are not bound by the rule, and the additional sum cannot be demanded.<sup>117</sup> It has been held in a few cases that the offer to carry passengers at a less rate if tickets were procured was in the nature of a proposal, like other proposals to enter into a contract, dependent for its acceptance upon the compliance with its condition; that it might be withdrawn at any time; that closing the office for the sale of tickets was such withdrawal; and that the offer carried with it no obligation on the part of the company to open an office, or to keep such office open for any length of time, it being merely an offer to make the deduction if the ticket should be procured.<sup>118</sup> But in a much larger number of cases, and with much better reason, it has been held that where the railroad undertakes to conduct its business by means of tickets, whether it requires, as it may, the possession of a ticket as a prerequisite to entering its cars, or whether it offers a deduction from the regular or advertised rate to one who shall procure a ticket in advance, it is a part of its duty to afford a reasonable opportunity to obtain its tickets.<sup>119</sup> Under the rule announced by these cases, it is absolutely necessary that the office

<sup>115</sup> *Swan v. Railroad Co.*, 132 Mass. 116; *St. Louis, A. & T. H. R. Co. v. South*, 43 Ill. 176; *Illinois Cent. R. Co. v. Johnson*, 67 Ill. 312; *Indianapolis, P. & C. Ry. Co. v. Rinard*, 46 Ind. 293; *Du Laurans v. Railroad Co.*, 15 Minn. 49 (Gil. 29).

<sup>116</sup> *Bordeaux v. Railway Co.*, 8 Hun, 579.

<sup>117</sup> *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1.

<sup>118</sup> *Crocker v. Railroad Co.*, 24 Conn. 249; *Bordeaux v. Erie Railway Co.*, 8 Hun, 579. And see *Snellbaker v. Railroad Co.*, 94 Ky. 597, 23 S. W. 509; *Lake Erie & W. R. Co. v. Quisenberry*, 48 Ill. App. 338.

<sup>119</sup> *St. Louis, A. & T. H. R. Co. v. South*, 43 Ill. 176; *Chicago & A. R. Co. v. Flagg*, Id. 364; *Illinois Cent. R. Co. v. Johnson*, 67 Ill. 312; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1; *Indianapolis, P. & C. Ry. Co. v. Rinard*, 46 Ind. 293; *Du Laurans v. Railroad Co.*, 15 Minn. 49 (Gil. 29); *Swan v. Railroad Co.*,

should be open for business a sufficient time before the departure of the train to enable passengers to procure their tickets, receive and count their change, if any, and prepare to board the train, without unnecessary interference with each other. But this does not require that the office shall remain open up to the instant the train moves off. The question is, might the passenger have procured a ticket within a reasonable time before the departure, and not up to the very moment when the wheels began to move.<sup>120</sup> When a train is late it is sufficient if the ticket office was open a reasonable time before the hour at which the train was advertised to start. For it would not be a reasonable rule to require ticket sellers to be at their posts, sometimes for hours, after the time when everything at the station had been arranged for departure.<sup>121</sup>

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#### SAME—TICKET AS EVIDENCE OF PASSENGER'S RIGHTS.

109. A ticket is only evidence of the carrier's contract with the passenger. But, between the passenger and the conductor or similar agent, the ticket is conclusive on the passenger.

A passenger ticket is not the contract between the carrier and the passenger. It is only evidence of such contract, and a receipt to show the payment of fare.<sup>122</sup> Not being the contract, its terms may be varied by parol evidence to show what the real contract with the passenger was.<sup>123</sup> But, between the passenger and the

132 Mass. 116; *Everett v. Railway Co.*, 69 Iowa, 15, 28 N. W. 410; *Cross v. Railway Co.*, 56 Mo. App. 624.

<sup>120</sup> *Everett v. Railway Co.*, 69 Iowa, 15, 28 N. W. 410.

<sup>121</sup> *Swan v. Railroad Co.*, 132 Mass. 116; *St. Louis A. & T. H. R. Co. v. South*, 43 Ill. 176. Contra, under a statute requiring ticket office to be kept open "at least one hour prior to the departure of each passenger train." *Porter v. Railroad Co.*, 34 Barb. 353.

<sup>122</sup> *Rawson v. Railroad Co.*, 48 N. Y. 212; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Boice v. Railroad Co.*, 61 Barb. 611; *Barker v. Coffin*, 31 Barb. 556; *Elmore v. Sands*, 54 N. Y. 512; *Johnson v. Railroad Corp.*, 46 N. H. 213; *Gordon v. Railroad Co.*, 52 N. H. 596; *State v. Overton*, 24 N. J. Law, 435; *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470.

<sup>123</sup> *Van Buskirk v. Roberts*, 31 N. Y. 661; *Northern R. Co. v. Page*, 22 Barb. 130; *Barker v. Coffin*, 31 Barb. 556; *Nevins v. Steamboat Co.*, 4 Bosw. (N. Y.)

conductor or agent of the carrier to whom the ticket is presented as evidence of the right to transportation, the ticket and its terms are conclusive on the passenger.<sup>124</sup> When a wrong ticket has been

225; Rawson v. Railroad Co., 48 N. Y. 212; Elmore v. Sands, 54 N. Y. 512; Brown v. Railroad Co., 11 Cush. 97; Johnson v. Railroad Corp., 46 N. H. 213; Crosby v. Railroad Co., 69 Me. 418; Burnham v. Railway Co., 63 Me. 298.

<sup>124</sup> Mosher v. Railroad Co., 23 Fed. 326; Hall v. Railroad Co., 15 Fed. 57; Petrie v. Railroad Co., 42 N. J. Law, 449; Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608, 17 Pac. 54; McKay v. Railroad Co., 34 W. Va. 65, 11 S. E. 737; Rose v. Railroad Co., 106 N. C. 168, 11 S. E. 526. "It may be unpleasant to a passenger who has once paid to submit to an additional exaction. But, unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results in his failure to have a proper ticket. \* \* \* It is no great hardship upon the passenger to put upon him the duty of seeing to it in the first instance that he receives and presents to the conductor a proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of his contract." Bradshaw v. Railroad Co., 135 Mass. 407. In Hufford v. Railroad Co., 53 Mich. 118, 18 N. W. 580, Cooley, C. J., said: "In Frederick v. Railroad Co., 37 Mich. 342, it was decided that, as between the passenger and the conductor, the ticket must be the conclusive evidence of the extent of the passenger's right to travel. No other rule can protect the conductor in the performance of his duties, or enable him to determine what he may or may not lawfully do in managing the train and collecting the fares. If, when a passenger makes an assertion that he has paid fare through, he can produce no evidence of it, the conductor must at his peril concede what the passenger claims, or take all the responsibilities of a trespasser if he refuses. It is easy to see that his position is one in which any lawless person, with sufficient imprudence and recklessness, may have him at disadvantage, and where he can never be certain, if he performs his apparent duty to his employer, that he may not be subjected to severe pecuniary responsibility. Such a state of things is not desirable either for railroad companies or for the public. The public is interested in having the rules whereby conductors are to govern their action certain and definite, so that they may be enforced without confusion and without stoppage of trains; and if the enforcement causes temporary inconvenience to a passenger, who, by accident or mistake, is without the proper evidence of his right to a passage, though he has paid for it, it is bet-

sold, the latter may, however, hold the carrier liable for breach of the contract to carry.<sup>125</sup> This becomes material principally in relation to the measure of damages, which will be discussed in the next chapter.<sup>126</sup> The passenger is bound by a provision in his

ter that he submit to the temporary inconvenience, than that the business of the road be interrupted, to the general annoyance of all who are upon the train. The conductor's duty, when the passenger is without the evidence of having paid his fare, is plain and imperative, and it can serve no good purpose and settle no rights to have a controversy with him. The passenger gains nothing by being put off the car, and loses nothing by paying what is demanded, and staying on." "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically, there are but two ways, —one, the evidence afforded by the ticket; the other, the statement of the passenger, contradicted by the ticket. Which should govern? \* \* \* There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence; and he must produce it, when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket, and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract; but he would have to adopt a declaration differing essentially from the one resorted to in this case." *Frederick v. Railroad Co.*, 37 Mich. 342. In this case the passenger had paid to a point beyond that called for by the ticket, and, refusing to pay fare, was ejected, and was denied a recovery in an action on the case. The principle enunciated in this case in Michigan that, as between the passenger and the conductor, the ticket is the conclusive evidence of the passenger's rights, is sustained in several well-considered cases. *Townsend v. Railroad Co.*, 56 N. Y. 295; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *McClure v. Railroad Co.*, 34 Md. 532; *Shelton v. Railroad Co.*, 29 Ohio St. 214; *Yorton v. Railway Co.*, 54 Wis. 234, 11 N. W. 482.

<sup>125</sup> *Murdock v. Railroad Co.*, 137 Mass. 293; *Muckle v. Railway Co.*, 29 N. Y. Supp. 732; *Townsend v. Railroad Co.*, 56 N. Y. 295; *Elliott v. Railroad Co.*, 53 Hun, 78, 6 N. Y. Supp. 363; *Frederick v. Railroad Co.*, 37 Mich. 342; *Lake Erie & W. R. Co. v. Flx*, 88 Ind. 381; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *Pittsburgh, C. & St. L. Ry. Co. v. Berryman*, 11 Ind. App. 640, 36 N. E. 728; *St. Louis, A. & T. Ry. Co. v. Mackie*, 71 Tex. 491, 9 S. W. 451; *Appleby v. Railway Co.*, 54 Minn. 169, 55 N. W. 1117. But see *Bradshaw v. Railroad Co.*, 135 Mass. 407.

<sup>126</sup> Post, p. 562.



ticket that the contract is not assignable;<sup>127</sup> that coupons are not good if detached;<sup>128</sup> that the ticket is good on certain trains only;<sup>129</sup> or that a return-trip coupon will not be honored unless stamped, etc.<sup>130</sup> So provisions that the ticket must be used within a certain time are binding,<sup>131</sup> but the journey need not be completed within that time. It is sufficient if it is begun before the time has expired.<sup>132</sup> In the absence of such a provision, a ticket is good at any time.<sup>133</sup> When the passenger has begun his journey, he has no right, unless otherwise agreed, to stop over at interme-

<sup>127</sup> *Way v. Railway Co.*, 64 Iowa, 48, 19 N. W. 828, *Post v. Railroad Co.*, 14 Neb. 110, 15 N. W. 225; *Walker v. Railroad Co.* 15 Mo. App. 333; *Drummond v. Railroad Co.*, 7 Utah, 118, 25 Pac. 733. And see, as to forfeiture of the ticket, *Freidenhich v. Railroad Co.*, 53 Md. 201; *Pittsburgh, C., C. & St. L. R. Co. v. Russ*, 6 C. C. A. 597, 57 Fed. 822.

<sup>128</sup> *Boston & M. R. Co. v. Chipman*, 146 Mass. 107, 14 N. E. 940; *Norfolk, N. & W. R. Co. v. Wysor*, 82 Va. 250; *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea (Tenn.) 180; *Houston & T. C. R. Co. v. Ford*, 53 Tex. 364. But see, where the coupons are detached by mistake, *Wightman v. Railway Co.*, 73 Wis. 169, 40 N. W. 689. And compare *Chicago, St. L. & P. R. Co. v. Holdrige*, 118 Ind. 281, 20 N. E. 837; *Rouser v. Railway Co.*, 97 Mich. 565, 56 N. W. 937; *Thompson v. Truesdale* (Minn.) 63 N. W. 259.

<sup>129</sup> *Lake Shore & M. S. Ry. Co. v. Rosenzweig*, 113 Pa. St. 519, 6 Atl. 545; *Thorp v. Railroad Co.*, 61 Vt. 378, 17 Atl. 791; *MacRae v. Railroad Co.*, 88 N. C. 526.

<sup>130</sup> *Mosher v. Railway Co.*, 127 U. S. 390, 8 Sup. Ct. 1324; *Boylan v. Railroad Co.*, 132 U. S. 146, 10 Sup. Ct. 50; *Edwards v. Railway Co.*, 81 Mich. 364, 45 N. W. 827; *Bowers v. Railroad Co.*, 158 Pa. St. 302, 27 Atl. 893; *Central Trust Co. v. East Tennessee, V. & G. Ry. Co.*, 65 Fed. 332.

<sup>131</sup> *Hill v. Railroad Co.*, 63 N. Y. 101; *Barker v. Coffin*, 31 Barb. 556; *Boice v. Railroad Co.*, 61 Barb. 611; *Wentz v. Railroad Co.*, 3 Hun, 241; *Boston & L. R. Co. v. Proctor*, 1 Allen, 267; *State v. Campbell*, 32 N. J. Law, 309; *Pennington v. Railroad Co.*, 62 Md. 95; *Lewis v. Railroad Co.*, 93 Ga. 225, 18 S. E. 650; *Johnson v. Railroad Co.*, 46 N. H. 213; *Rawitzky v. Railroad Co.*, 40 La. Ann. 47, 3 South. 387. Contra, *Texas & P. Ry. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400; by statute, *Dryden v. Railroad Co.*, 60 Me. 512.

<sup>132</sup> *Auerback v. Railroad Co.*, 89 N. Y. 281; *Lundy v. Railroad Co.*, 66 Cal. 191, 4 Pac. 1193; *Gulf, C. & S. F. Ry. Co. v. Wright* (Tex. Civ. App.) 30 S. W. 294; *Evans v. Railroad Co.*, 11 Mo. App. 463. And see *Georgia & C. R. Co. v. Bigelow*, 68 Ga. 219; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276.

<sup>133</sup> *Pennsylvania R. Co. v. Spicker*, 105 Pa. St. 142. And see *Dryden v. Railroad Co.*, 60 Me. 512.

diante points, and then to insist on being carried to his destination on the same ticket.<sup>134</sup> But a coupon ticket over several roads entitles the passenger to stop at the end of each carrier's line, in the absence of any express limitation.<sup>135</sup>

### SAME—RIGHT TO MAKE REGULATIONS.

**110. A public carrier of passengers can make and enforce reasonable regulations for the management of its vehicles and the conduct of passengers.**

Carriers of passengers can make whatever regulations they find necessary for the safe and proper management of their trains or other vehicles. These regulations are valid and binding on passengers, if they are reasonable.<sup>136</sup> It has been seen that railroad companies are not bound to carry passengers on their freight trains.<sup>137</sup> Carriers may require passengers to ride in certain parts of their vehicles, as in the passenger cars, and not in the baggage cars or on the engine.<sup>138</sup> These regulations are reasonable, but a

<sup>134</sup> *Hamilton v. Railroad Co.*, 51 N. Y. 100; *Beebe v. Ayres*, 28 Barb. 275; *Terry v. Railroad Co.*, 13 Hun, 359; *Cheney v. Railroad Co.*, 11 Mete. (Mass.) 121; *Oil Creek R. Co. v. Clark*, 72 Pa. St. 231; *Dietrich v. Railroad Co.*, 71 Pa. St. 432; *Vankirk v. Railroad Co.*, 76 Pa. St. 66; *Wyman v. Railroad Co.*, 34 Minn. 210, 25 N. W. 349; *Pennsylvania R. Co. v. Parry*, 55 N. J. Law, 551. 27 Atl. 914; *Cleveland, C. & C. R. Co. v. Bartram*, 11 Ohio St. 457; *Drew v. Railroad Co.*, 51 Cal. 425; *Green v. Railroad Co.*, 50 Tex. 43; *Johnson v. Railroad Co.*, 63 Md. 106; *Roberts v. Koehler*, 30 Fed. 94. Contra, by statute, *Carpenter v. Railroad Co.*, 72 Me. 388.

<sup>135</sup> *Brooke v. Railroad Co.*, 15 Mich. 332; *Little Rock & F. S. R. Co. v. Dean*, 43 Ark. 529.

<sup>136</sup> *Day v. Owen*, 5 Mich. 520; *Chicago & N. W. Ry. Co. v. Williams*, 55 Ill. 185; *Hoffbauer v. Railroad Co.*, 52 Iowa, 342, 3 N. W. 121; *State v. Chovin*, 7 Iowa, 204; *Hibbard v. Railroad Co.*, 15 N. Y. 455; *Vedder v. Fellows*, 20 N. Y. 126; *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21; *Du Laurans v. Railroad Co.*, 15 Minn. 49 (Gil. 29); *Gleason v. Transportation Co.*, 32 Wis. 85; *Bass v. Railway Co.*, 36 Wis. 450; *State v. Overton*, 24 N. J. Law, 435; *Brown v. Railroad Co.*, 4 Fed. 37, 7 Fed. 51; *Ft. Scott, W. & W. Ry. Co. v. Sparks* (Kan. Sup.) 39 Pac. 1032.

<sup>137</sup> *Ante*, p. 491.

<sup>138</sup> *O'Donnell v. Railroad Co.*, 59 Pa. St. 239; *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160; *Houston & T. C. R. Co. v. Clemmons*, 55 Tex. 88.

rule prohibiting passengers from changing their seats while en route would not be.<sup>139</sup>

The dominion of a railroad corporation over its trains, tracks, and right of way is no less complete or exclusive than that which every owner has over his own property. Hence the corporation may exclude whom it pleases, when they come to transact their own private business with passengers or other third persons, and admit whom it pleases, when they come to transact such business.<sup>140</sup>

Carriers not only have the power, but are bound, to take all reasonable and proper means to provide for the comfort and convenience of passengers. It follows that they have a right, in the exercise of this authority and duty, to repress and prohibit all disorderly conduct in their vehicles, and to expel therefrom any person whose conduct or condition is such as to render acts of impropriety, rudeness, indecency, or disturbance either inevitable or probable.<sup>141</sup> The agent in charge of the vehicle is not bound to wait until some overt act of violence or other misconduct has been committed, to the inconvenience or annoyance of other passengers, before exercising his authority to expel the offender. The right and power of the carrier and his servants to prevent the occurrence of improper and disorderly conduct in a public vehicle is quite as essential and important as the authority to stop a disturbance or repress acts of violence or breaches of decorum after they have been committed and the mischief of annoyance and disturbance has been done.<sup>142</sup>

<sup>139</sup> Green, C. J., in *State v. Overton*, 24 N. J. Law, 435, 441. And see *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 5 South 633.

<sup>140</sup> *Fluker v. Railroad Co.*, 81 Ga. 461, 8 S. E. 529.

<sup>141</sup> *Vinton v. Railroad Co.*, 11 Allen, 304; *Sullivan v. Railroad Co.*, 148 Mass. 119, 18 N. E. 673; *Baltimore, P. & C. R. Co. v. McDonald*, 68 Ind. 316; *Peavy v. Railroad Co.*, 81 Ga. 485, 8 S. E. 70; *Chicago City Ry. Co. v. Pelletier*, 134 Ill. 120, 24 N. E. 770.

<sup>142</sup> *Vinton v. Railroad Co.*, 11 Allen, 304. But see *Putnam v. Railroad Co.*, 55 N. Y. 108.

## SAME—LIABILITY FOR DELAY.

111. A public carrier of passengers is liable for any damage caused by his failure to use due diligence to transport passengers according to his published time-table, and for delays caused by his negligence after transportation has begun.

*Conforming to Published Time-Table.*

By the publication of time-tables, a carrier of passengers makes an offer to the public to transport all persons who may apply in accordance therewith.<sup>143</sup> When this offer is accepted by the purchase of a ticket or an application for passage, the carrier is bound to make all reasonable efforts to comply with his time-table, and is liable to such persons for all damages due to his delay.<sup>144</sup> When changes are made in a time-table, the same publicity must be given to them as to the original publication. If the regular time-table was published in a newspaper, and no notice of a change is given except the posting of a notice in the carrier's office, this would not be sufficient to excuse the carrier.<sup>145</sup>

If the time is varied, and a train fails to go at the appointed time, for the mere convenience of the carrier or a portion of his expected passengers, a person who presents himself at the advertised hour, and demands a passage, is not bound by the change unless he has had reasonable notice of it. But, even after the sale of a ticket, the carrier has a right, by giving reasonable notice, to vary the time of running his trains or other vehicles.<sup>146</sup>

*Delay in Transportation.*

After the transportation of a passenger has begun, the carrier is liable if he fails to complete the trip with reasonable diligence and speed. But for delays due to other causes than the carrier's de-

<sup>143</sup> Hawcroft v. Railway Co., 8 Eng. Law & Eq. 362; Hamlin v. Railroad Co., 1 Hurl. & N. 408.

<sup>144</sup> Sears v. Railroad Co., 14 Allen, 433; Savannah, S. & S. R. Co. v. Bonaud, 58 Ga. 180; Heirn v. M'Caughan, 32 Miss. 17.

<sup>145</sup> Sears v. Railroad Co., 14 Allen, 433.

<sup>146</sup> Id.

fault or negligence, such as the act of God, the carrier is not liable.<sup>147</sup> The carrier, of course, may, by special contract, bind himself to carry within a certain time; and in such case even the act of God will not excuse him.<sup>148</sup>

#### SAME—INJURIES TO PASSENGERS.

112. Public carriers of passengers are not insurers of safety, but they are bound to exercise the highest degree of care possible under the circumstances.

113. Proof of damage to the passenger by the carrier raises a presumption of actionable negligence on the part of the carrier, which may be rebutted—

- (a) By bringing the case within exceptions similar to those recognized in the case of carriers of goods (p. 526);
- (b) By showing the absence of negligence on the part of the carrier (p. 526); or
- (c) By showing contributory negligence on the part of the passenger (p. 527).

#### *Degree of Care Due Passengers.*

“A carrier of passengers is not an insurer.<sup>149</sup> Not only does the intelligence and volition of the person carried create a differ-

<sup>147</sup> *Quimby v. Vanderbilt*, 17 N. Y. 306; *Williams v. Vanderbilt*, 28 N. Y. 217; *Weed v. Railroad Co.*, 17 N. Y. 362; *Var Buskirk v. Roberts*, 31 N. Y. 661; *Eddy v. Harris*, 78 Tex. 661, 15 S. W. 107; *Alabama & V. Ry. Co. v. Purnell*, 69 Miss. 652, 13 South. 472; *Cobb v. Howard*, 3 Blatchf. 524, Fed. Cas. No. 2,924; *Hamlin v. Railway Co.*, 1 Hurl. & N. 408; *Hobbs v. Railway Co.*, L. R. 10 Q. B. 111.

<sup>148</sup> *Walsh v. Railroad Co.*, 42 Wis. 23. And see, for other instances of special contract, *Williams v. Vanderbilt*, 28 N. Y. 217; *Ward v. Vanderbilt*, 4 Abb. Dec. (N. Y.) 521; *Watson v. Duykinck*, 3 Johns. 335; *Dennison v. The Wataga*, 1 Phila. (Pa.) 468; *Brown v. Harris*, 2 Gray, 359; *Porter v. The New England*, 17 Mo. 290; *West v. The Uncle Sam*, 1 McAll. 505, Fed. Cas. No. 17,427.

<sup>149</sup> 2 Jagg. Torts, p. 1083; *White v. Boulton, Peake*, 113 (this is the first case on the subject); *Hubbard, J.*, in *Ingalls v. Bills*, 9 Metc. (Mass.) 1. Et vide *Crofts v. Waterhouse*, 11 Moore, 133; *Bennett v. Dutton*, 10 N. H. 481; *Readhead v. Railway Co.*, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.



ence in the degree of care which it is proper to demand of the carrier, corresponding to the allowance for the inherent vice or disease of live stock, but the courts also recognize that one result of making carriers of passengers insurers would have been either the refusal of the carrier to undertake passenger traffic, or their refusal of it except upon special contract affecting any individual case.<sup>150</sup> A carrier is not necessarily guilty of negligence, although it may have been possible to have prevented the damage;<sup>151</sup> but he is bound to exercise, at least, such diligence as a good specialist in such business is accustomed to use, and this must rise in proportion to the risk.<sup>152</sup> Indeed, the cases generally recognize that the carrier must exercise the utmost care under the circumstances, short of a warranty of the safety of the passenger."<sup>153</sup> This stringent rule as to the duty and liability of carriers of passengers rests on considerations of public policy growing out of the interest which

<sup>150</sup> Schouler, Bailm. § 652. Notes, with numerous citations, as to the degree of care required towards passengers, 58 Am. & Eng. R. Cas. 73, 90, 110, 133, 194.

<sup>151</sup> *Gilbert v. Railway Co.*, 160 Mass. 403, 36 N. E. 60. But see *Jackson v. Tollett*, 2 Starkie, 37; *Mayhew v. Boyce*, 1 Starkie, 423; *Card v. Railroad Co.*, 50 Barb. 39; *Crofts v. Waterhouse*, 3 Bing. 319.

<sup>152</sup> Whart. Neg. §§ 627-637. This standard is, however, severely criticised. *Carrico v. Railway Co.*, 35 W. Va. 389, 14 S. E. 12; *Hutch. Carr.* p. 501, note 1.

<sup>153</sup> *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291; *Chicago & A. R. Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578; *Chicago, P. & St. L. Ry. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960; *Spellman v. Transit Co.*, 36 Neb. 890, 55 N. W. 270; *Gulf, C. & S. F. Ry. Co. v. Higby* (Tex. Civ. App.) 26 S. W. 737; *Douglas v. Railway Co. (Iowa)* 58 N. W. 1070; *Bischoff v. Railway Co.*, 121 Mo. 216, 25 S. W. 908; *Wilson v. Railroad Co.*, 26 Minn. 278, 3 N. W. 333; *International & G. N. Ry. Co. v. Welch*, 86 Tex. 203, 24 S. W. 391; *Taylor v. Pennsylvania Co.*, 50 Fed. 755; *Jackson v. Railway Co.*, 118 Mo. 199, 24 S. W. 192; *Gulf, C. & S. F. Ry. Co. v. Stricklin* (Tex. Civ. App.) 27 S. W. 1093; *Christie v. Griggs*, 2 Camp. 79; *Dunn v. Railway Co.*, 58 Me. 187; *The New World v. King*, 16 How. 469; *Hutch. Carr.* § 500 et seq. As to operation of horse-car lines, *Noble v. Railway Co.*, 98 Mich. 249, 57 N. W. 126; *Watson v. Railway Co.*, 42 Minn. 46, 43 N. W. 904. An instruction that a carrier of passengers is bound to run and operate its cars "with the highest degree of care of a very prudent person, in view of all the facts and circumstances at the time of the alleged injury," does not require too high a degree of care. *O'Connell v. Railway Co.*, 106 Mo. 482, 17 S. W. 494. And, generally, as to requirement of highest measure of care in conduct of business by common car-

the state or government as *parens patriæ* has in protecting the lives and limbs of its subjects.<sup>154</sup> These considerations apply with peculiar force to passengers on public conveyances, owing to the great number of persons who daily and necessarily employ them. One curious effect of this reason for the rule is to be observed in the distinction between the duty owed to intending passengers by the carrier and that owed to other persons. As to intending passengers, the protection of this extraordinary liability of the carrier is extended even before the passenger has boarded the conveyance; while as to other persons, even though rightfully on the carrier's premises, the carrier is liable only for the exercise of ordinary care.<sup>155</sup>

*Same—In Transit.*

"The carrier of passengers is responsible for injuries received by passengers in the course of their transportation, which might have been avoided or guarded against by the exercise, on his part, of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate—that is, sufficiently secure, as to strength and other requisites—for the safe conveyance of passengers. That duty the law enforces with great strictness. For

riers, see *Willock v. Railroad Co.*, 166 Pa. St. 184, 30 Atl. 948; *Greenh. Pub. Pol.* 513. Cable lines, *Watson v. Railway Co.*, 42 Minn. 46, 43 N. W. 904. Electric lines, *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269. To prevent electric shock from defective insulation, *Burt v. Railway Co.*, 83 Wis. 229, 53 N. W. 447. Elevators, *Mitchell v. Marker*, 10 C. C. A. 306, 62 Fed. 139. A ferry, *McLean v. Burbank*, 11 Minn. 277 (Gil. 189), 12 Minn. 530 (Gil. 438).

<sup>154</sup> *Jacobus v. Railway Co.*, 20 Minn. 125 (Gil. 110). And see *Shear. & R. Neg.* § 24; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 12; *Philadelphia & R. R. Co. v. Derby*, 14 How. 486; *The New World v. King*, 16 How. 469; *Smith v. Railroad Co.*, 24 N. Y. 222; *Illinois Cent. R. Co. v. Read*, 37 Ill. 484; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Bissell v. Railroad Co.*, 25 N. Y. 442, 455, per *Denio, J.*; *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357.

<sup>155</sup> See post, p. 528.

the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages.”<sup>156</sup>

When it is said that carriers are held to the highest degree of care and diligence for the safety of their passengers, it is not meant that they are required to use every possible precaution, for that, in many instances, would defeat the very objects of their employment. There are certain dangers that are necessarily incident to certain modes of travel, and these the passenger assumes when he elects to adopt such mode. But all that is meant is that they should use the highest degree of care that is reasonably consistent with the practical conduct of the business.<sup>157</sup> They are not required, for instance, with respect to either passenger or freight trains, to use steel rails and iron or granite cross-ties, because such ties are less liable to decay, and hence safer, than those of wood; nor, upon freight trains, air brakes, bell pulls, and a brakeman upon every car; but it does emphatically require everything necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier, and the means of conveyance employed.<sup>158</sup>

Carriers are not responsible for hidden defects in their appliances which no human care or skill could have either detected or

<sup>156</sup> *Pennsylvania Co. v. Roy*, 102 U. S. 451, 456.

<sup>157</sup> *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291; *Dunn v. Railway Co.*, 58 Me. 187; *Hegeman v. Railroad Corp.*, 13 N. Y. 9; *Kansas Pac. Ry. Co. v. Miller*, 2 Colo. 442; *Pershing v. Railway Co.*, 71 Iowa, 561, 32 N. W. 488. “It sometimes happens that a derailed train is precipitated from a high embankment, and the lives of its passengers endangered or destroyed. Accidents of that character could be avoided by constructing all railroad embankments of such a width that a derailed train or car would come to a stop before reaching the declivity. But this would add immensely to the cost of constructing such improvements, and, if required, would in many cases prevent their construction entirely. If passenger trains were run at the rate of ten miles per hour, instead of from twenty-five to forty miles, it is probable that all danger of derailment would be avoided. But railroad companies could not reasonably be required to adopt that rate of speed. Their roads are constructed with a view to rapid transit, and the traveling public would not tolerate the running of trains at that low speed.” *Pershing v. Railroad Co.*, *supra*.

<sup>158</sup> *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291.

prevented. They do not warrant that their appliances are free from such a defects and imperfections.<sup>159</sup>

It is established by the great weight of authority that, so far as passengers are concerned, the carrier is liable for the negligence of the manufacturer from whom he purchases appliances. Therefore, a carrier is liable even for latent defects, which could not be discovered by the most careful external examination, if it could have been ascertained by any known test applied either by the manufacturer or the carrier.<sup>160</sup>

Railroads must keep pace with science and art and modern im-

<sup>159</sup> *Ingalls v. Bills*, 9 Metc. (Mass.) 1. "A latent defect which will relieve it from responsibility is such only as no reasonable degree of skill and foresight could guard against." *Palmer v. Canal Co.*, 120 N. Y. 170, 24 N. E. 302. See, also, *Frink v. Potter*, 17 Ill. 406; *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558; *Sawyer v. Railroad Co.*, 37 Mo. 240; *Derwort v. Loomer*, 21 Conn. 245; *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672; *Anthony v. Railroad Co.*, 27 Fed. 724; *Carter v. Railway Co.*, 42 Fed. 37; *Frink v. Coe*, 4 G. Greene (Iowa) 555. And see *Alden v. Railroad Co.* 26 N. Y. 102, criticised in *McPadden v. Railroad Co.*, 44 N. Y. 478, and in *Carroll v. Railroad Co.*, 58 N. Y. 126, 139. See, also, *Readhead v. Railway Co.*, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.

<sup>160</sup> *Hegeman v. Railroad Corp.*, 13 N. Y. 9; *Caldwell v. Steamboat Co.*, 47 N. Y. 282; *Carroll v. Railroad Co.*, 58 N. Y. 126; *Curtis v. Railroad Co.*, 18 N. Y. 534, 538; *Perkins v. Railroad Co.*, 24 N. Y. 196, 219; *Bissell v. Railroad Co.*, 25 N. Y. 442; *Illinois Cent. R. Co. v. Phillips*, 49 Ill. 234. And see *Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 Ind. 150. Contra, *Nashville & D. R. Co. v. Jones*, 9 Heisk. 27. In the absence of notice that the company will not be liable for defective appliances in a sleeping-car, a passenger may well assume that the whole train is under one general management. *Thorpe v. Railway Co.*, 76 N. Y. 402; *Kinsley v. Railroad Co.*, 125 Mass. 54; *Railroad Co. v. Walrath*, 38 Ohio, St. 461. "All that they can reasonably be expected to do is to purchase such cars and other necessities as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers." *Grand Rapids & L. R. Co. v. Huntley*, 38 Mich. 537.

provement, in their application to the carriage of passengers, but are not responsible for the unknown as well as the new.<sup>161</sup>

The carrier is bound to exercise the highest degree of care, in view of all circumstances, to prevent damage to its passengers by the operation of its means of conveyance, avoiding sudden starts and stops,<sup>162</sup> danger from curves,<sup>163</sup> or a dangerous rate of speed.<sup>164</sup> It is negligence not to announce, or to wrongly announce, stations,<sup>165</sup> but not to neglect to state that the train will stop at a railroad crossing before it reaches the next station.<sup>166</sup> Where a carrier receives a person as a passenger who is unable to take care of himself, it is negligence for the carrier to fail to take care of him.<sup>167</sup> Care has reference to the passenger's physical and mental

<sup>161</sup> *Meier v. Railroad Co.*, 64 Pa. St. 225.

<sup>162</sup> *Holmes v. Traction Co.*, 153 Pa. St. 152, 25 Atl. 640; *Yarnell v. Railroad Co.*, 113 Mo. 570, 21 S. W. 1; *North Chicago St. R. Co. v. Cook*, 145 Ill. 551, 33 N. E. 958; *Bowdle v. Railway Co.* (Mich.) 61 N. W. 529; *Poole v. Banking Co.*, 89 Ga. 320, 15 S. E. 321; *Cassidy v. Railroad Co.*, 9 Misc. Rep. 275, 29 N. Y. Supp. 724; *Hill v. Railway Co.*, 158 Mass. 458, 33 N. E. 582; *Chicago & A. R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204. As to street cars where passengers are alighting, *Cawfield v. Railway Co.*, 111 N. C. 597, 16 S. E. 703; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976 (alighting from train); *Robinson v. Railway Co.*, 157 Mass. 224, 32 N. E. 1; *Conway v. Railroad Co.*, 46 La. Ann. 1429, 16 South. 362; *Washington & G. R. Co. v. Harmon's Adm'r*, 147 U. S. 571, 13 Sup. Ct. 557.

<sup>163</sup> *Lynn v. Southern Pac. Co.*, 103 Cal. 7, 36 Pac. 1018; *Francisco v. Railroad Co.*, 78 Hun, 13, 29 N. Y. Supp. 247; *Brusch v. Railway Co.*, 52 Minn. 512, 55 N. W. 57. Et vide *Highland Ave. & B. R. Co. v. Donovan*, 94 Ala. 299, 10 South. 139.

<sup>164</sup> *Andrews v. Railway Co.*, 86 Iowa, 677, 53 N. W. 399; *Chicago, P. & St. L. Ry. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860; *Willmott v. Railway Co.*, 106 Mo. 535, 17 S. W. 490; *Mexican Cent. Ry. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277. As to effect of municipal ordinance, *Cogswell v. Railway Co.*, 5 Wash. 46, 31 Pac. 411.

<sup>165</sup> *Pennsylvania Co. v. Hoagland*, 78 Ind. 203. Cf. *Railroad Co. v. Aspell*, 23 Pa. St. 147.

<sup>166</sup> *Minoek v. Railway Co.*, 97 Mich. 425, 56 N. W. 780.

<sup>167</sup> *Weightman v. Railway Co.*, 70 Miss. 563, 12 South. 586, distinguishing *Sevier v. Vicksburg & M. R. Co.*, 61 Miss. 8; *Meyer v. Railway Co.*, 4 C. C. A. 221, 54 Fed. 116; *Sawyer v. Dulany*, 30 Tex. 479; *Sheridan v. Railroad Co.*, 36 N. Y. 39; *Philadelphia C. P. Ry. Co. v. Hassard*, 75 Pa. St. 367; *Al-*



condition. The carrier must care for a person manifestly intoxicated if he is received as a passenger.<sup>168</sup>

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*Wrongful Acts of Agents or Servants.*

The carrier is liable for injury to a passenger from wrongful acts of its agents or servants done within the course of their employment.<sup>169</sup> The carrier also owes the passenger the duty of protection from violence, and therefore is liable for any willful assault upon the passenger by an employé, although the act be entirely outside of his duties, and not for the purpose of serving his employers.<sup>170</sup> This rule as to the carrier's liability for his servant's

lison v. Railroad Co., 42 Iowa, 274; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568-584; Indianapolis, P. & C. Ry. Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70; Croom v. Railway Co., 52 Minn. 296, 53 N. W. 1128. When a child of such tender and imbecile age is brought to a railway station or to any conveyance, for the purpose of being conveyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge. Such care not being used, where the child has no natural capacity to judge of the surrounding circumstances, a child might get into serious danger from a state of things which would produce no disastrous consequences to an adult capable of taking care of himself. Waite v. Railway Co., EL, Bl. & EL 719, per Cockburn, C. J., in exchequer chamber.

<sup>168</sup> Fisher v. Railroad Co., 19 S. E. 578.

<sup>169</sup> Hoffman v. Railroad Co., 87 N. Y. 25; Railroad Co. v. Walrath, 38 Ohio St. 461; Thorpe v. Railroad Co., 76 N. Y. 402; Pennsylvania Co. v. Roy, 102 U. S. 451; article, 25 Am. Law Rev. 569. See Edwards v. Railway Co., L. R. 5 C. P. 445.

<sup>170</sup> Fick v. Railway Co., 68 Wis. 469, 32 N. W. 527; Bryant v. Rich, 106 Mass. 180; Craker v. Railway Co., 36 Wis. 657; Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530; Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N. E. 85; Heenrich v. Pullman Palace Car Co., 20 Fed. 100; Ramsden v. Railroad Co., 104 Mass. 117; Chicago & E. R. Co. v. Flexman, 103 Ill. 546; Thomp. Carr. Pass. 352-377. In some cases the fact of the retention of the employé by the carrier after knowledge of the wrongful act is deemed material, as indicating ratification. Goddard v. Railway Co., 57 Me. 202; Bass v. Railway Co., 42 Wis. 654. In Bryant v. Rich, 106 Mass. 180, where the plaintiff, a passenger on a steamboat, was assaulted and injured by the steward and some of the table waiters, the defendant, as a common carrier, was held liable for the injury. In Craker v. Railway Co., 36 Wis. 657, where the

willful wrongful acts does not apply in case of violence to trespassers.<sup>171</sup>

*Wrongful Acts of Fellow Passengers or Others.*

It is a carrier's duty to protect his passengers against violence or improper conduct from fellow passengers or outsiders, so far as such protection can be furnished in the exercise of ordinary care and foresight.<sup>172</sup> There is no such privity between a railway company and a passenger as to make it liable for the wrongful acts of the passenger upon any principle.<sup>173</sup> But if a passenger receives injury, which might have been reasonably anticipated or naturally

conductor of a railroad train kissed a female passenger against her will, the court, in an elaborate opinion, held the railroad company liable for compensatory damages. It is there said: "We cannot think there is a question of the respondent's right to recover against the appellant for a tort which was a breach of the contract of carriage." In *Sherley v. Billings*, 8 Bush, 147, where a passenger on defendant's boat was assaulted and injured by an officer on the boat, the defendant was held liable. See, also, *McKinley v. Railroad Co.*, 44 Iowa, 314, and *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546. In *Goddard v. Railway Co.*, 57 Me. 202, in discussing this question, the court says: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. \* \* \* He must not only protect his passengers against the violence and insults of strangers and copassengers, but, a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed,—if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted through the negligence of the carrier's servant, the carrier is necessarily responsible." *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546.

<sup>171</sup> *Marion v. Railroad Co.*, 59 Iowa, 428.

<sup>172</sup> *Pittsburgh, Ft. W. & C. Ry. Co. v. Hinds*, 53 Pa. St. 512; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200; *Felton v. Railroad Co.*, 69 Iowa, 577, 29 N. W. 618; *Britton v. Railway Co.*, 88 N. C. 536; *Putnam v. Railroad Co.*, 55 N. Y. 108; *Batton v. Railroad Co.*, 77 Ala. 591; *Chicago & A. R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22; *Pittsburg & C. R. Co. v. Pillow*, 76 Pa. St. 510; *Thomp. Carr. Pass.* 295-305.

<sup>173</sup> *Pittsburgh, Ft. W. & C. Ry. Co. v. Hinds*, 53 Pa. St. 512. Nor will the wrong or negligence of the carrier be imputed to the passenger, so as to bar his remedy against a third person. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391.

expected, from one who is improperly received, or permitted to continue as a passenger, the carrier is responsible.<sup>174</sup>

*Stational Facilities.*

It is the carrier's duty to exercise due care to make its stations, wharves, and approaches thereto safe for passengers. A distinction is to be observed between the degree of care to be exercised in the construction and maintenance of tracks and running machinery by railroad corporations and the degree of care to be exercised with regard to stational facilities. As to the former, the carrier is held to the use of the utmost possible care in discovering and remedying defects therein.<sup>175</sup> As to the latter, the carrier is liable only for the want of ordinary care.<sup>176</sup> Thus, it was said in a New York case<sup>177</sup> that as to "the approaches to the cars, such as platforms, halls, stairways, and the like, a less degree of care is required, and for the reason that the consequences of a neglect of the highest skill and care which human foresight can attain to are naturally of a much less serious nature. The rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended." The failure to properly light the platform,<sup>178</sup> allowing snow and ice to accumulate<sup>179</sup> or other obstructions<sup>180</sup> to remain thereon, or such a con-

<sup>174</sup> Putnam v. Railroad Co., 55 N. Y. 108; Flint v. Transportation Co., 34 Conn. 554; Pittsburgh, Ft. W. & C. Ry. Co. v. Hinds, 53 Pa. St. 512; Flint v. Transportation Co., 6 Blatchf. 158, Fed. Cas. No. 4,873.

<sup>175</sup> Hutch. Carr. § 521a. See ante, p. 519.

<sup>176</sup> Palmer v. Pennsylvania Co., 111 N. Y. 488, 18 N. E. 859; Moreland v. Railroad Corp. 141 Mass. 31, 6 N. E. 225.

<sup>177</sup> Kelly v. Railroad Co., 112 N. Y. 443, 20 N. E. 383.

<sup>178</sup> Jamison v. Railroad Co., 55 Cal. 593; Peniston v. Railroad Co., 34 La. Ann. 777; Patten v. Railway Co., 32 Wis. 524, 36 Wis. 413; Beard v. Railroad Co., 48 Vt. 101; Buenemann v. Railway Co., 32 Minn. 390, 20 N. W. 379; Dice v. Locks Co., 8 Or. 60.

<sup>179</sup> Memphis & C. R. Co. v. Whitfield, 44 Miss. 466; Weston v. Railroad Co., 42 N. Y. Super. Ct. 156; Seymour v. Railway Co., 3 Biss. 43, Fed. Cas. No. 12,685.

<sup>180</sup> Osborn v. Ferry Co., 53 Barb. 629; Martin v. Railway Co., 16 C. B. 179. Holes in platform, Knight v. Railroad Co., 56 Me. 234; Chicago & N. W. Ry. Co. v. Fillmore, 57 Ill. 265; Liscomb v. Transportation Co., 6 Lans. (N. Y.) 75. Passengers obliged to cross tracks, Keating v. Railroad Co., 3 Lans.

struction that part of a moving train projects over the platform,<sup>181</sup> have been held to constitute negligence for which the carrier is liable.

*Presumption of Negligence—How Rebutted.*

Proof of an accident, not resulting from the act of the passenger, is sufficient to raise a presumption of actionable negligence on the part of the carrier.<sup>182</sup> This is merely a presumption of fact, and may be rebutted. But the burden of doing so rests on the carrier.\* The presumption may be rebutted by showing that the accident was caused solely by the act of God<sup>183</sup> or the public enemy.<sup>184</sup> But, where the carrier's negligence has contributed to the injury, the carrier will be liable, although an act of God was the immediate cause.<sup>185</sup> The principles involved here are not different from those applicable to carriers of goods.<sup>186</sup>

The carrier may also rebut the presumption of negligence by

(N. Y.) 469; *Baltimore & O. R. Co. v. State*, 60 Md. 449; *Klein v. Jewett*, 26 N. J. Eq. 474.

<sup>181</sup> *Langan v. Railway Co.*, 72 Mo. 392; *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167; *Dobiecki v. Sharp*, 88 N. Y. 203.

<sup>182</sup> *Christie v. Griggs*, 2 Camp. 79; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. St. 351; *Louisville, N. A. & C. Ry. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18; *Seybolt v. Railroad Co.*, 95 N. Y. 562; *Feital v. Railroad Co.*, 109 Mass. 398; *Cleveland, C., C. & I. R. Co. v. Walrath*, 38 Ohio St. 461; *Memphis & O. R. P. Co. v. McCool*, 83 Ind. 392; *Cleveland, C., C. & I. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836; *The Sydney*, 27 Fed. 119; *Thomp. Carr. Pass.* 181-197. See, also, *Tompkins v. Railroad Co.*, 66 Cal. 163, 4 Pac. 1165.

\**Laing v. Colder*, 8 Pa. St. 482; *Sullivan v. Railroad Co.*, 30 Pa. St. 234; *Shear. & R. Neg.* § 280; *Redf. R. R.* § 1760, and notes; *Meier v. Railroad Co.*, 64 Pa. St. 225.

<sup>183</sup> *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. St. 351; *Pittsburgh, Ft. W. & C. Ry. Co. v. Brigham*, 29 Ohio St. 374; *International & G. N. R. Co. v. Halloren*, 53 Tex. 46; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176; *Gates v. Railway Co.*, 28 Minn. 110, 9 N. W. 579; *Houston & T. C. Ry. Co. v. Fowler*, 56 Tex. 452; *Ely v. Railway Co.*, 77 Mo. 34; *McPadden v. Railroad Co.*, 44 N. Y. 478. Cf. *Kansas Pac. Ry. Co. v. Miller*, 2 Colo. 442.

<sup>184</sup> *Sawyer v. Railroad Co.*, 37 Mo. 240.

<sup>185</sup> *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. St. 356; *Davis v. Railroad Co.*, 55 Vt. 84; *Ellet v. Railway Co.*, 76 Mo. 518; *Pruitt v. Railroad Co.*, 62 Mo. 527.

<sup>186</sup> See ante, p. 401.

showing that it was not due to negligence on his part.<sup>187</sup> Carriers of passengers are not liable for injuries caused by inevitable accident, or such as no human foresight could avert.<sup>188</sup> The carrier is not liable for injuries caused solely by the act of the injured person,<sup>189</sup> or by a third person, unconnected with the carrier in any way.<sup>190</sup> But, where the carrier has been negligent, the fact that the wrong of a third person contributed to cause the injury is no defense.

The presumption of liability may also be rebutted by showing that the passenger was guilty of contributory negligence. But where the passenger's negligence was known to the carrier, and the injury might, by the subsequent use of care and prudence on the part of the carrier, have been avoided, the latter is liable in spite of the contributory negligence of the passenger.<sup>191</sup> Last Clear Chance

<sup>187</sup> Stokes v. Saltonstall, 13 Pet. 181; Railroad Co. v. Pollard, 22 Wall. 341; Pershing v. Railway Co., 71 Iowa, 561, 32 N. W. 488.

<sup>188</sup> Atchison & N. R. Co. v. Plinn, 24 Kan. 627; Beach v. Parmeter, 23 Pa. St. 196.

<sup>189</sup> Gulf, C. & S. F. R. Co. v. Wallen, 65 Tex. 568. See, as to general principle, Kleimenhagen v. Railway Co., 65 Wis. 66, 26 N. W. 264; Woolf v. Beard, 8 Car. & P. 373; Caswell v. Worth, 5 El. & Bl. 849; Evansville & C. R. Co. v. Hiatt, 17 Ind. 102. See, also, Eckert v. Railroad Co., 43 N. Y. 502; Chicago, B. & Q. R. Co. v. Landauer, 39 Neb. 803, 58 N. W. 434; Illinois Cent. R. Co. v. Davidson, 12 C. C. A. 118, 64 Fed. 301; collection of authorities on contributory negligence by passengers, 58 Am. & Eng. R. Cas. 326, 336, 358, 375, 393, 410.

<sup>190</sup> Curtis v. Railroad Co., 18 N. Y. 534; Pittsburgh, Ft. W. & C. Ry. Co. v. Hinds, 53 Pa. St. 512; Keeley v. Railway Co., 47 How. Prac. 257; Harris v. Railroad Co., 13 Fed. 591; Reddie v. Railroad Co., 4 Exch. 244; Daniel v. Railway Co., L. R. 3 C. P. 216, 591.

<sup>191</sup> Illinois Cent. R. Co. v. Green, 81 Ill. 19; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21; Dunn v. Railway Co., 58 Me. 187; Blake v. Railway Co., 78 Iowa, 57, 42 N. W. 580; Morrison v. Railway Co., 56 N. Y. 302; Filer v. Railroad Co., 59 N. Y. 251; Burrows v. Railway Co., 63 N. Y. 556; Ohio & M. Ry. Co. v. Stratton, 78 Ill. 88; Railroad Co. v. Gladmon, 15 Wall. 401; Pennsylvania Co. v. Langendorff, 48 Ohio, 316, 28 N. E. 172; Chicago & A. R. Co. v. Gretzner, 46 Ill. 74; Boland v. Railroad Co., 36 Mo. 484; Morrissey v. Ferry Co., 43 Mo. 380; Meeks v. Railroad Co., 56 Cal. 513; State v. Railroad Co., 24 Md. 84; Kean v. Railroad Co., 61 Md. 154; Button v. Railroad Co., 18 N. Y. 248. As to when negligence of parent or guardian will be imputed to child, see Ohio & M. Ry. Co. v. Stratton, 78 Ill. 88; Waite v. Railway Co., El. & Bl. &



*Duty to Persons not Passengers.*

But a carrier is bound to the exercise of only ordinary care towards persons coming to their stations to meet passengers expected to arrive or escorting those departing.<sup>192</sup> The same degree of care is required towards other persons lawfully on the carrier's premises, such as passengers of another carrier, with whom a station is jointly occupied;<sup>193</sup> a hackman who brings a passenger to the station;<sup>194</sup> or employés of another carrier properly present in the performance of their duties.<sup>195</sup>

El. 719; *Schindler v. Railway Co.*, 87 Mich. 400, 49 N. W. 670; *Wymore v. Mahaska Co.*, 78 Iowa, 396, 43 N. W. 264. The negligence of the carrier will not be imputed to the passenger in an action by the latter against a third person. *Chapman v. Railroad Co.*, 19 N. Y. 341; *Bennett v. Transportation Co.*, 36 N. J. Law, 225; *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391; *Tompkins v. Railroad Co.*, 66 Cal. 163, 4 Pac. 1165; *Thomp. Carr.* 273-294; *Dean v. Railroad Co.*, 129 Pa. St. 514, 18 Atl. 718; *Becke v. Railway Co.*, 102 Mo. 544, 13 S. W. 1053; *Elyton Land Co. v. Mingea*, 89 Ala. 521, 7 South. 666. Under the doctrine of comparative negligence, in Illinois, Georgia, and Tennessee, a recovery may sometimes be had although plaintiff was guilty of contributory negligence. *Wabash, St. L. & P. Ry. Co. v. Wallace*, 110 Ill. 114; *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478; *Atlanta & R. A. L. Ry. Co. v. Ayers*, 53 Ga. 12; *Central R. Co. v. Gleason*, 69 Ga. 200; *Augusta & S. R. Co. v. McElmurry*, 24 Ga. 75; *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 347; *Railroad Co. v. Walker*, 11 Heisk. 383; *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 128.

<sup>192</sup> *Dowd v. Railway Co.*, 84 Wis. 105, 54 N. W. 24; *Doss v. Railroad Co.*, 59 Mo. 27; *Railway Co. v. Lawton*, 55 Ark. 428, 18 S. W. 543; *McKone v. Railroad Co.*, 51 Mich. 601, 17 N. W. 74; *Langan v. Railway Co.*, 72 Mo. 392; *Stiles v. Railroad*, 65 Ga. 370; *Tobin v. Railroad Co.*, 59 Me. 183; *Yarnell v. Railroad Co.*, 113 Mo. 570, 21 S. W. 1; *Hamilton v. Railway Co.*, 64 Tex. 251; *Lucas v. Railroad Co.*, 6 Gray, 64; *Griswold v. Railroad Co.*, 64 Wis. 652, 26 N. W. 101; *Texas & P. R. Co. v. Best*, 66 Tex. 116, 18 S. W. 224; *Missouri, K. & T. Ry. Co. v. Miller* (Tex. Civ. App.) 27 S. W. 905; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Jenkins v. Railway Co.*, 37 L. T. (N. S.) 193.

<sup>193</sup> *Tebbutt v. Railway Co.*, L. R. 6 Q. B. 73.

<sup>194</sup> *Tobin v. Railroad Co.*, 59 Me. 183.

<sup>195</sup> *Railroad Co. v. Armstrong*, 49 Pa. St. 186; *Philadelphia, W. & B. R. Co. v. State*, 58 Md. 374; *Illinois Cent. R. Co. v. Frelka*, 110 Ill. 498; *Zeigler v. Railroad Co.*, 52 Conn. 543; *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637; *In re Merrill*, 54 Vt. 200; *Vose v. Railway Co.*, 2 Hurl. & N. 728; *Graham v. Railway Co.*, 18 C. B. (N. S.) 229; *Swainson v. Railway Co.*, L. R. 3 Exch. 341; *Warburton v. Railway Co.*, L. R. 2 Exch. 30. And see, as to consignors, consignees, and their agents personally assisting in the reception or

A railroad company is not liable for failure to exercise ordinary care and skill in the erection, structure, or maintenance of its station house or houses as to persons who enter or are at the same, not on any business with the company or its agents, nor on any business connected with the operation of its road, but are there without objection by the company, and therefore by its mere sufferance or permission;<sup>196</sup> as where a person takes refuge in the station house during a storm,<sup>197</sup> or is on the platform as a mere sightseer.<sup>198</sup>

#### SAME—CONTRACTS LIMITING LIABILITY.

114. Carriers of passengers cannot, even by express contract, limit their liability for their own or their servants' negligence.

**EXCEPTIONS**—Some courts hold that, as to gratuitous passengers, carriers may stipulate against liability for ordinary, but not for gross, negligence; others, that carriers may stipulate against liability for negligence of employes, but not for their personal negligence.

Substantially the same considerations are applicable where carriers of passengers seek to limit their liability for negligence as are applicable where carriers of goods seek to limit their liability.<sup>199</sup>

delivery of their freight, *Holmes v. Railway Co.*, 4 Exch. 254; *Wright v. Railway Co.*, L. R. 10 Q. B. 298, 1 Q. B. Div. 252 *Allegheny V. R. Co. v. Findley*, 4 Wkly. Notes Cas. 438; *Foss v. Railway Co.*, 33 Minn. 392, 23 N. W. 553; *Watson v. Railway Co.*, 66 Iowa, 164, 23 N. W. 380; *Illinois Cent. R. Co. v. Hoffman*, 67 Ill. 287; *Newton v. Railroad Co.*, 29 N. Y. 383; *New Orleans, J. & G. N. R. Co. v. Bailey*, 40 Miss. 395; *Shelbyville, L. B. R. Co. v. Lewark*, 4 Ind. 471; *Shelbyville, L. B. R. Co. v. Lynch*, 4 Ind. 494; *Dufour v. Railroad Co.*, 67 Cal. 319, 7 Pac. 769; *Mark v. Railway Co.*, 32 Minn. 208, 20 N. W. 131; *Blakemore v. Railway Co.*, 8 El. & Bl. 1035; *Goldstein v. Railway Co.*, 46 Wis. 404, 1 N. W. 37; *Burns v. Railroad Co.*, 101 Mass. 50; *Rogstad v. Railway Co.*, 31 Minn. 208, 17 N. W. 287.

<sup>196</sup> *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Gillis v. Railroad Co.*, 59 Pa. St. 129; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500.

<sup>197</sup> *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, *supra*.

<sup>198</sup> *Gillis v. Railroad Co.*, *supra*.

<sup>199</sup> See *ante*, p. 413.

Indeed, the public policy prohibiting such agreements is even stronger in the case of passenger carriers. Life and limbs are of more importance than property. In many jurisdictions, therefore, it is held that carriers of passengers cannot, even by special contract, limit their liability for either their own or their servants' negligence.<sup>200</sup> In many other jurisdictions, however, such contracts have been sustained with more or less qualification and limitation. Contracts of this sort, to be held valid, must, of course, be sustained by a consideration.<sup>201</sup> It is usually held that, where a passenger is carried for hire, a contract limiting liability is absolutely void. This has been applied to cases where one was not really, though ostensibly, carried free, as where one traveled on a drover's pass or the like.<sup>202</sup> But there has been much conflict and confusion of opinion as to the effect of a limitation of liability contained in an absolutely free pass. As has been seen, public policy requires the same degree of care towards free passengers as towards paying ones.<sup>203</sup> In this respect, carriers of passengers differ from carriers of goods. Many courts have accordingly held that, even as to free passengers, a carrier cannot relieve itself of lia-

<sup>200</sup> *Railroad Co. v. Lockwood*, 17 Wall. 367; *Rose v. Railroad Co.*, 39 Iowa, 246; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1; *Jacobus v. Railway Co.*, 20 Minn. 125 (Gil. 110); *Carroll v. Railway Co.*, 88 Mo. 239; *Gulf, C. & S. F. R. Co. v. McGowan*, 65 Tex. 640; *Thomp. Carr.* 378, 402; *Hutch. Carr.* §§ 581-586; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Ohio & M. Ry. Co. v. Selby*, 47 Ind. 471. "So far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can, then, be permitted to stand. Whether the case be one of a passenger for hire,—a merely gratuitous passenger,—or of a passenger upon a conditioned free pass, the interest of the state in the safety of the citizen is obviously the same." *Jacobus v. Railroad Co.*, 20 Minn. 125 (Gil. 110).

<sup>201</sup> *Seybolt v. Railroad Co.*, 95 N. Y. 562. *Express messenger, Brewer v. Railroad Co.*, 124 N. Y. 59, 26 N. E. 324; *Bates v. Railroad Co.*, 147 Mass. 235, 17 N. E. 633.

<sup>202</sup> *Lawson, Ballm.* § 247; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1; *Knowlton v. Railway Co.*, Id. 260; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Lawson v. Railway Co.*, 64 Wis. 447, 24 N. W. 618; *Tibby v. Railway Co.*, 82 Mo. 292; *Railway Co. v. Stevens*, 95 U. S. 655.

<sup>203</sup> See ante, 497.

bility of its own or its servants' negligence.<sup>204</sup> Other courts have held that, as to free passengers, a carrier may, by express contract, stipulate against liability for the negligence of its employés, as distinguished from its personal negligence,<sup>205</sup> even though the negligence be gross.<sup>206</sup> In other jurisdictions the rule is that the carrier may contract against the negligence of its servants only when it is not gross or willful.<sup>207</sup> In Wisconsin a carrier may contract against liability for the ordinary negligence of its servants, unless the same is expressly made a crime.<sup>208</sup>

<sup>204</sup> *Railroad Co. v. Lockwood*, 17 Wall. 357; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486; *Rose v. Railroad Co.*, 39 Iowa, 246; *Jacobus v. Railway Co.*, 20 Minn. 125 (Gil. 110); *Bryan v. Railway Co.*, 32 Mo. App. 228; *Buffalo, P. & W. R. Co. v. O'Hara*, 12 Wkly. Notes Cas. 473; *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335; *Camden & A. R. Co. v. Bausch* (Pa. Sup.) 7 Atl. 731.

<sup>205</sup> *Welles v. Railroad Co.*, 26 Barb. 641, 24 N. Y. 181; *Perkins v. Railroad Co.*, 24 N. Y. 196; *Kinney v. Railroad Co.*, 32 N. J. Law, 407; *Bates v. Railroad Co.*, 147 Mass. 255, 17 N. E. 633; *Quimby v. Railroad Co.*, 150 Mass. 365, 23 N. E. 205; *Griswold v. Railroad Co.*, 53 Conn. 371, 4 Atl. 261. Where there is an abatement in the regular fare, see *Bissell v. Railroad Co.*, 25 N. Y. 442; *Poucher v. Railroad Co.*, 49 N. Y. 263. Purchase of seat in drawing-room car by one riding on a pass does not make him a passenger for hire, and he is bound by a limitation of liability contained in the pass. *Ulrich v. Railroad Co.*, 108 N. Y. 80, 15 N. E. 60.

<sup>206</sup> *Griswold v. Railroad Co.*, 53 Conn. 371, 4 Atl. 261; *Perkins v. Railroad Co.*, 24 N. Y. 196; *Bissell v. Railroad Co.*, 25 N. Y. 442; *Kinney v. Railroad Co.*, 32 N. J. Law, 407, 34 N. J. Law, 513. Contra, *Higgins v. Railroad Co.*, 28 La. Ann. 133. In New York the special conditions are sufficient to absolve the carrier from liability, even for the gross negligence of his employés. *Welles v. Railway Co.*, 24 N. Y. 181; *Perkins v. Railway Co.*, Id. 196; *Bissell v. Railway Co.*, 25 N. Y. 442. In New Jersey it is held that such conditions are good as against ordinary negligence, with a very decided intimation that the exemption from liability comprehends gross negligence also. *Kinney v. Railroad Co.*, 34 N. J. Law, 513. In Pennsylvania, Illinois, Indiana, and several other states the courts hold that no such condition will avail to protect the carrier from responsibility for the gross negligence of its employés. *Illinois Cent. R. Co. v. Read*, 37 Ill. 484; *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 136; *Indiana Cent. Ry. Co. v. Mundy*, 21 Ind. 48; *Pennsylvania R. Co. v. McCloskey's Adm'r*, 23 Pa. St. 532; *Mobile & O. Ry. Co. v. Hopkins*, 41 Ala. 489; *Jacobus v. Railroad Co.*, 20 Minn. 125 (Gil. 110).

<sup>207</sup> *Arnold v. Railroad Co.*, 83 Ill. 273; *Illinois Cent. R. Co. v. Read*, 37 Ill. 484; *Indiana Cent. Ry. Co. v. Mundy*, 21 Ind. 48.

<sup>208</sup> *Annas v. Railroad Co.*, 67 Wis. 46, 30 N. W. 282.

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## TERMINATION.

**115.** The termination of the exceptional liability of a public carrier of passengers to persons transported in his vehicles will be considered under the following heads:

- (a) Ejection from vehicle (p. 532).
- (b) Alighting at station (p. 537).
- (c) Connecting carriers (p. 539).

After the relation of passenger and carrier is established, the carrier can terminate it only by fulfilling his contract for transportation, or by ejecting the passenger for misconduct. This will be considered in the next section. The passenger, however, may terminate his relation as such to the carrier at any time he chooses by leaving the carrier's vehicle with an intention of abandoning his rights as a passenger. He may do this even though he has not reached the point to which his contract for transportation entitles him to be carried.<sup>209</sup> The carrier's liability, however, is not terminated by the passenger leaving the train or other conveyance for a temporary purpose,<sup>210</sup> as to procure refreshments,<sup>211</sup> or in passing from one of the carrier's conveyances to another.<sup>212</sup> Nor does a passenger cease to be such by rendering assistance to the carrier or his servants in case of an accident.<sup>213</sup>

<sup>209</sup> Buckley v. Railroad Co., 161 Mass. 26, 36 N. E. 583. But see Johnson v. Railroad Co., 63 Md. 106.

<sup>210</sup> Parsons v. Railroad Co., 113 N. Y. 355, 21 N. E. 145; Keokuk Packet Co. v. True, 88 Ill. 608; Watson v. Railroad Co., 92 Ala. 320, 8 South. 770; Dice v. Transportation Co., 8 Or. 60; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568. But see Johnson v. Railroad Co., 125 Mass. 75.

<sup>211</sup> Parsons v. Railroad Co., 113 N. Y. 355, 363, 21 N. E. 145; Dodge v. Steamship Co., 148 Mass. 207, 19 N. E. 373; Hoebrik v. Carr, 29 Fed. 298; Peniston v. Railroad Co., 34 La. Ann. 777; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568; Pitcher v. Railroad Co., 55 Hun, 604, 8 N. Y. Supp. 389.

<sup>212</sup> Northrup v. Assurance Co., 43 N. Y. 516; Hulbert v. Railroad Co., 40 N. Y. 145.

<sup>213</sup> McIntire Ry. Co. v. Bolten, 43 Ohio St. 224, 1 N. E. 333.



## SAME—EJECTION FROM VEHICLE.

116. A carrier may terminate his liability to a passenger by ejecting him from his vehicle for improper conduct or a refusal to comply with the carrier's proper regulations.
117. The ejection may be at any place, except in some states, by statute, where it must be at a station or near a dwelling house.
118. In ejecting a passenger no more force is to be used than is necessary to accomplish that purpose, and it must not be done in a manner which will endanger the passenger's safety.

*For What Causes.*

It has already been seen that a public carrier of passengers is entitled to his compensation before the termination of the journey,<sup>214</sup> and that he may make reasonable regulations as to the conduct of the passenger.<sup>215</sup> If a passenger refuses to pay his fare,<sup>216</sup> or to comply with the carrier's proper regulations, he may be ejected.<sup>217</sup> So the carrier has a right to eject from his vehicle a passenger who so conducts himself that he is offensive or dangerous to other passengers.<sup>218</sup> Such conduct is usually forbidden by

<sup>214</sup> Ante, p. 507.

<sup>215</sup> Ante, p. 514.

<sup>216</sup> *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9; *Pittsburgh, C. & St. L. Ry. Co. v. Dewin*, 86 Ill. 296; *Great Western Ry. Co. v. Miller*, 19 Mich. 305; *Gibson v. Railroad Co.*, 30 Fed. 904; *O'Brien v. Railroad Co.*, 15 Gray, 20; *State v. Campbell*, 32 N. J. Law, 309; *Wyman v. Railroad Co.*, 34 Minn. 210, 25 N. W. 349; *Lillis v. Railroad Co.*, 64 Mo. 464; *Grogan v. Railway Co. (W. Va.)* 19 S. E. 593. Cf. *Ramsden v. Railroad Co.*, 104 Mass. 117.

<sup>217</sup> *Illinois, etc., R. Co. v. Whittemore*, 43 Ill. 420; *McClure v. Railroad Co.* 34 Md. 532; *Denver Tramway Co. v. Reed*, 4 Colo. App. 500, 36 Pac. 557.

<sup>218</sup> *Vinton v. Railroad Co.*, 11 Allen, 304; *Sullivan v. Railroad Co.*, 148 Mass. 119, 18 N. W. 678; *Murphy v. Railway Co.*, 118 Mass. 228; *Baltimore, P. & C. R. Co. v. McDonald*, 68 Ind. 316; *Peavy v. Railroad Co.*, 81 Ga. 485, 8 S. E. 70; *Chicago City Ry. Co. v. Pelletier*, 134 Ill. 120, 24 N. E. 770.

the regulations of the carrier, and has been discussed under that head.<sup>219</sup>

*Re-entry after Ejection.*

Although a passenger refuses to pay his fare or to comply with some proper rule of the carrier, he may nevertheless tender the sum demanded, or offer compliance with the regulation at any time before the carrier or his servant has begun to eject him. In such case the carrier is bound to accept the passenger's offer, and to permit him to continue his journey.<sup>220</sup> But when the passenger persists in his refusal until steps are taken to eject him,—such as by stopping a train,—an offer to comply with the carrier's demand comes too late, and the carrier may complete the expulsion.<sup>221</sup> So, if the passenger has been ejected from the carrier's vehicle for nonpayment of fare, he cannot then tender payment, and insist on being carried, if the ejection was at some point not a station.<sup>222</sup> If the rightful expulsion takes place at a station, it is not an unreasonable rule that the person expelled should pay the fare over the distance already traveled before he can purchase a ticket from such station for the remainder of the journey which will entitle him to be carried on the same train.<sup>223</sup>

<sup>219</sup> See ante, p. 514.

<sup>220</sup> Hutch. Carr. (2d Ed.) § 591a. *Ham v. Canal Co.*, 142 Pa. St. 617, 21 Atl. 1012; *O'Brien v. Railroad Co.*, 80 N. Y. 236; *Railroad Co. v. Garrett*, 8 Lea, 438; *Texas & P. Ry. Co. v. Bond*, 62 Tex. 442; *South Carolina R. Co. v. Nix*, 68 Ga. 572.

<sup>221</sup> *Hibbard v. Railroad Co.*, 15 N. Y. 455; *O'Brien v. Railroad Co.*, 80 N. Y. 236; *Pease v. Railroad Co.*, 101 N. Y. 367, 5 N. E. 37; *Hoffbauer v. Railroad Co.*, 52 Iowa, 344, 3 N. W. 121; *State v. Campbell*, 32 N. J. Law, 309; *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Pickens v. Railroad Co.*, 104 N. C. 312, 10 S. E. 556; *Clark v. Railroad Co.*, 91 N. C. 506; *Atchison, T. & S. F. R. Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500; *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea (Tenn.) 180; *Galveston, etc. Ry. Co. v. Turner* (Tex. Civ. App.) 23 S. W. 83; *Harrison v. Fink*, 42 Fed. 787.

<sup>222</sup> *O'Brien v. Railroad Co.*, 15 Gray, 20. But see *Ferguson v. Railroad Co.*, 98 Mich. 533, 57 N. W. 801; *O'Brien v. Railroad Co.*, 80 N. Y. 236; *Pickens v. Railroad Co.*, 104 N. C. 312, 10 S. E. 556.

<sup>223</sup> *Swan v. Railroad Co.*, 132 Mass. 116; *Stone v. Railroad Co.*, 47 Iowa, 82; *Pennington v. Railroad Co.*, 62 Md. 95; *O'Brien v. Railroad Co.*, 80 N. Y. 236. But see *Ward v. Railroad Co.*, 56 Hun, 268. In *State v. Campbell*, 32

If the carrier has received part of the fare demanded,—as where the passenger pays the price of a ticket, but refuses to pay an additional sum demanded of those not having tickets,—the amount paid must be refunded before there is a right to eject him.<sup>224</sup>

*Place of Ejection.*

By the common law, when a cause exists for which a carrier may eject a passenger, the carrier is not bound to wait until he has reached a regular stopping place. For instance, a railway train may be stopped anywhere between stations, and an offending passenger put off.<sup>225</sup> In a number of states, however, it is now provided by statute that passengers may be ejected only at stations, or near some dwelling house.<sup>226</sup>

N. J. Law, 309, the passenger had an excursion ticket from New Brunswick to New York, good for a single day, which had passed, and the ticket was thus exhausted. He had also a regular ticket, which entitled him to a passage between the same points. The latter ticket he kept in his pocket, refused to exhibit any other than the exhausted ticket, and was ejected from the cars at Newark, a station on the road. He then exhibited the regular ticket, which would have entitled him to the passage if previously shown, and claimed a right to re-enter the cars. His previous conduct was held to fully justify his exclusion from the same train.

<sup>224</sup> Bland v. Railroad Co., 55 Cal. 570. But see Hoffbauer v. Railroad Co., 52 Iowa, 342, 3 N. W. 121, contra, where the amount paid was no more than the carrier was entitled to for the distance the passenger was carried before being ejected. And compare Burnham v. Railroad Co., 63 Me. 298; Cheney v. Railroad Co., 11 Mete. (Mass.) 121.

<sup>225</sup> Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; O'Brien v. Railroad Co., 15 Gray, 20; Brown v. Railroad Co., 51 Iowa, 235, 1 N. W. 487; Wyman v. Railroad Co., 34 Minn. 210, 25 N. W. 349; Lillis v. Railroad Co., 64 Mo. 464; Great Western Ry. Co. v. Miller, 19 Mich. 305; McClure v. Railroad Co., 34 Md. 532.

<sup>226</sup> Wright v. Railroad Co., 78 Cal. 360, 20 Pac. 740; Terre Haute v. Vantatta, 21 Ill. 187; Illinois Cent. R. Co. v. Latimer, 128 Ill. 163, 21 N. E. 7 (but see Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; Toledo, W. & W. R. Co. v. Wright, 68 Ind. 586); Texas & P. R. Co. v. Casey, 52 Tex. 112; Baldwin v. Railway Co., 64 N. H. 596; South Florida R. Co. v. Rhodes, 25 Fla. 40, 5 South. 633; Hobbs v. Railroad Co., 49 Ark. 357, 5 S. W. 586. A commutation railway ticket, conditioned to be "good for 1,000 miles," and "within six months," is not good after six months, although the holder has not traveled 1,000 miles on it; and where, after the expiration of that period, he enters the baggage car of the company, and refuses to pay his fare except by pre-

*Circumstances of Ejection—Force Used—Resistance.*

In ejecting the passenger from the carrier's vehicle, there must be no wanton disregard of the passenger's safety.<sup>1</sup> A passenger must not be put off at a distance from a station in a dangerous storm, or when his life would be in danger from the severity of the weather.<sup>227</sup> So a carrier must not eject the passenger in a dangerous place,<sup>228</sup> nor from a rapidly moving train.<sup>229</sup> When there is a right to eject a passenger, no more force is to be used than is necessary to accomplish that purpose, and for any excessive force or willful injury the carrier is liable.<sup>230</sup> If the passenger resists, sufficient force to overcome his resistance may be used.<sup>231</sup> But when it is wrongfully attempted to eject the passenger, as from a rapidly moving train, or under circumstances which give no right to eject him, the passenger may resist, and, if he receives injuries from so doing, he can recover therefor from the carrier.<sup>232</sup> It must

senting such ticket, he is a trespasser, and may be ejected at any point, and is not entitled to the benefit of a statute which prohibits the ejection of passengers except near a dwelling house or at a station. *Lillis v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 464.

<sup>227</sup> *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163, 21 N. E. 7; *Brown v. Railroad Co.*, 51 Iowa, 235, 1 N. W. 487; *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624; *Toledo, W. & W. R. Co. v. Wright*, 68 Ind. 586; *Hall v. Railroad Co.*, 28 S. C. 261, 5 S. E. 623.

<sup>228</sup> *Gulf, C. & S. F. R. Co. v. Kirkbridge*, 79 Tex. 457, 15 S. W. 495; *Louisville & N. R. Co. v. Ellis (Ky.)* 30 S. W. 979; *Johnson v. Railroad Co. (Ala.)* 16 South. 75.

<sup>229</sup> *Sanford v. Railroad Co.*, 23 N. Y. 343; *State v. Kinney*, 34 Minn. 311, 25 N. W. 705; *Brown v. Railroad Co.*, 66 Mo. 588; *Gulf, C. & S. F. R. Co. v. Kirkbridge*, 79 Tex. 457, 15 S. W. 495; *Fell v. Railroad Co.*, 44 Fed. 248.

<sup>230</sup> *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039; *Holmes v. Wakefield*, 12 Allen, 580; *Pennsylvania R. Co. v. Vandier*, 42 Pa. St. 365; *Bass v. Railroad Co.*, 36 Wis. 450; *Mykleby v. Railway Co.*, 39 Minn. 54, 38 N. W. 763; *Evansville & I. R. Co. v. Gilmore*, 1 Ind. App. 468, 27 N. E. 992; *Gulf, C. & S. F. Ry. Co. v. Kuenhle (Tex. App.)* 16 S. W. 177; *Knowles v. Railroad Co.*, 102 N. C. 59, 9 S. E. 7; *Jardine v. Cornell*, 50 N. J. Law, 485, 14 Atl. 590; *Brown v. Railroad Co.*, 66 Mo. 588; *Philadelphia, W. & B. R. Co. v. Larkin*, 47 Md. 155. But see *Pittsburgh, C., C. & St. L. Ry. Co. v. Russ*, 6 C. C. A. 597, 57 Fed. 822.

<sup>231</sup> *Townsend v. Railroad Co.*, 56 N. Y. 295

<sup>232</sup> *Sanford v. Railroad Co.*, 23 N. Y. 343; *English v. Canal Co.*, 66 N. Y. 454; *Louisville, N. A. & C. R. Co. v. Wolfe*, 128 Ind. 347, 27 N. E. 606. In the

be remembered, however, that the passenger's ticket is conclusive between the passenger and the conductor,<sup>233</sup> and when, under his ticket, the passenger may properly be ejected, he cannot rightfully resist.<sup>234</sup> It is probable that this suggestion harmonizes the apparent conflict in the cases on this point.<sup>235</sup>

#### SAME—ALIGHTING AT STATION.

**119. After reaching his destination, a passenger is entitled to a reasonable time and opportunity to alight from the carrier's vehicle before the latter's exceptional liability is terminated.**

When a carrier of passengers has transported a person to the place designated in the contract of carriage, the carrier still owes the passenger certain duties before his liability is terminated. The carrier must stop his vehicle at his usual depot, and not compel the passenger to alight before reaching it,<sup>236</sup> nor carry him beyond.<sup>237</sup> A passenger can recover for injuries sustained by alighting at a wrong place by the carrier's invitation;<sup>238</sup> as where the name of a

last two cases the passenger had paid his fare, and was ejected for refusal to pay again. He was in each case permitted to recover for injuries due to his resistance.

<sup>233</sup> See ante, p. 510.

<sup>234</sup> *Townsend v. Railroad Co.*, 56 N. Y. 295.

<sup>235</sup> See *Hutch. Carr.* (2d Ed.) § 593; *Lawson Ballm.* § 258.

<sup>236</sup> *Louisville, N. A. & C. Ry. Co. v. Cook* (Ind. App.) 38 N. E. 1104; *Brulard v. Albion*, 45 Fed. 766; *Miller v. Railway Co.*, 93 Ga. 630, 21 S. E. 153; *Dudley v. Smith*, 1 Camp. 167.

<sup>237</sup> *International & G. N. Ry. Co. v. Terry*, 62 Tex. 380; *Illinois Cent. R. Co. v. Able*, 59 Ill. 131; *Illinois Cent. R. Co. v. Chambers*, 71 Ill. 519; *Reed v. Railway Co.*, 100 Mich. 507, 59 N. W. 144; *East Tennessee, V. & G. R. Co. v. Lockhart*, 79 Ala. 315; *White Water R. Co. v. Butler*, 112 Ind. 598, 14 N. E. 599; *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 9 South. 375; *Georgia R. Co. v. McCurdy*, 45 Ga. 288; *Mobile & O. R. Co. v. McArthur*, 43 Miss. 180; *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Fordyce v. Dillingham* (Tex. Civ. App.) 23 S. W. 550; *Texas & P. Ry. Co. v. Mansell*, Id. 549.

<sup>238</sup> *Louisville, N. A. & C. Ry. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968; *Richmond City Ry. Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Philadelphia, W. & B. R. Co. v. McCormick*, 124 Pa. St. 427, 16 Atl. 818; *Griffith v. Railway Co.*, 98 Mo.



station is announced, and the vehicle is stopped before reaching the usual platform, this is considered an invitation to alight.<sup>239</sup> While it is not the duty of conductors on a train to see to the debarkation of passengers,<sup>240</sup> they should have the stations announced;<sup>241</sup> and they should stop the trains sufficiently long for the passengers for each station to get off.<sup>242</sup> When this is done, their duty to the passengers is performed. All assistance that a conductor may extend to ladies without escorts or with children, or to persons who are sick, and ask his assistance in getting on and off trains, is purely

168, 11 S. W. 559; *Cockle v. Railway Co.*, L. R. 5 C. P. 457, L. R. 7 C. P. 321; *Lewis v. Railway Co.*, L. R. 9 Q. B. 66; *Weller v. Railway Co.*, L. R. 9 C. P. 126; *Bridges v. Railway Co.*, L. R. 7 H. L. 213.

<sup>239</sup> *Columbus & I. C. Ry. Co. v. Farrell*, 31 Ind. 408; *Terre Haute v. Buck*, 96 Ind. 346; *Philadelphia, W. & B. R. Co. v. McCormick*, 124 Pa. St. 427, 16 Atl. 848; *Philadelphia & R. R. Co. v. Edelstein* (Pa. Sup.) 16 Atl. 847; *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. 631; *Gulf, C. & S. F. R. Co. v. Sain* (Tex. Civ. App.) 24 S. W. 958; *International & G. N. R. Co. v. Smith* (Tex. Sup.) 14 S. W. 642; *Memphis & L. R. Ry. Co. v. Stringfellow*, 44 Ark. 322; *Richmond & D. R. Co. v. Smith*, 92 Ala. 237, 9 South. 223. Mere calling out name of the station will not, under all circumstances, be an invitation to alight. *Central R. Co. v. Van Horn*, 38 N. J. Law, 133; *Smith v. Railway Co.*, 88 Ala. 538, 7 South. 119; *England v. Railroad Co.*, 153 Mass. 490, 27 N. E. 1; *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519, 20 Atl. 2; *International & G. N. R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. 679.

<sup>240</sup> *Nunn v. Railroad Co.*, 71 Ga. 710.

<sup>241</sup> *Raben v. Railway Co.*, 73 Iowa, 579, 35 N. W. 645; *Hurt v. Railway Co.*, 94 Mo. 255, 7 S. W. 1; *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 738, 2 South. 360.

<sup>242</sup> *Keller v. Railroad Co.*, 27 Minn. 178, 6 N. W. 486; *Raben v. Railway Co.*, 73 Iowa, 579, 35 N. W. 645; *Hurt v. Railway Co.*, 94 Mo. 255, 7 S. W. 1; *Straus v. Railway Co.*, 75 Mo. 185; *Mississippi & T. R. Co. v. Gill*, 66 Miss. 39, 5 South. 393; *Fairmount & A. S. P. Ry. Co. v. Stutler*, 54 Pa. St. 375; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292; *Mulhado v. Railroad Co.*, 30 N. Y. 370; *Ferry v. Railway Co.*, 118 N. Y. 497, 23 N. E. 822; *Baker v. Railway Co.*, 118 N. Y. 533, 23 N. E. 885; *Wood v. Railway Co.*, 49 Mich. 370, 13 N. W. 779; *Finn v. Railway Co.*, 86 Mich. 74, 48 N. W. 696. If one about to alight is injured by the premature starting of a train, he may recover. *Washington & G. R. Co. v. Harmon's Adm'r*, 147 U. S. 571, 13 Sup. Ct. 557; *Hill v. Railway Co.*, 158 Mass. 458, 33 N. E. 582; *Gilbert v. Railway Co.*, 160 Mass. 403, 36 N. E. 60; *Onderdonk v. Railway Co.*, 74 Hun, 42, 26 N. Y. Supp. 310; *Bernstein v. Railroad Co.*, 72 Hun, 46, 25 N. Y. Supp. 669; *Chicago & A. R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204; *Illinois Cent. R. Co. v. Taylor*, 46 Ill. App. 141.

a matter of courtesy.<sup>243</sup> It is not the conductor's duty to go through the train and see that every person is safely passed out of the cars.<sup>244</sup> He is not bound to wake sleeping passengers, and inform them of their arrival at their destination.<sup>245</sup> Even if the conductor has agreed to wake a passenger, his failure to do so will not make the carrier liable.<sup>246</sup> If a sufficient time is given passengers to get off the carrier's vehicle, and they fail to do so, they cannot still claim the rights of passengers, and the carrier's exceptional liability will be at an end.<sup>247</sup> But under certain circumstances the carrier's relation to passengers as such might continue until they have a sufficient time and opportunity to leave the station, and pass off the carrier's premises.<sup>248</sup>

#### SAME—CONNECTING CARRIERS.

120. When a passenger is received for transportation over connecting lines, the initial carrier's liability terminates at the end of his line, though he may by contract, or a partnership agreement, become liable for through transportation. A few cases hold the carrier liable in the absence of such contract.

In considering the termination of a passenger carrier's liability where connecting carriers are concerned, the same principles are

<sup>243</sup> *Nunn v. Railroad Co.*, 71 Ga. 710; *Raben v. Railroad Co.*, 73 Iowa, 579, 35 N. W. 645; *Id.*, 74 Iowa, 732, 34 N. W. 621

<sup>244</sup> *Raben v. Railroad Co.*, *supra*.

<sup>245</sup> *Nunn v. Railroad Co.*, 71 Ga. 710; *Sevier v. Railroad Co.*, 61 Miss. 8; *Texas & P. Ry. Co. v. Alexander* (Tex. Civ. App.) 30 S. W. 1113. But a sleeping-car company is bound to awaken passengers. *Pullman Palace-Car Co. v. Smith*, 79 Tex. 468, 14 S. W. 993.

<sup>246</sup> *Sevier v. Railroad Co.*, 61 Miss. 8; *Missouri, K. & T. Ry. Co. of Texas v. Kendrick* (Tex. Civ. App.) 32 S. W. 42.

<sup>247</sup> *Imhoff v. Railroad Co.*, 22 Wis. 649; *Clotworthy v. Railroad Co.*, 80 Mo. 220; *Hurt v. Railway Co.*, 94 Mo. 255, 7 S. W. 1; *Chicago, K. & W. R. Co. v. Frazer* (Kan.) 40 Pac. 923. And see *Coleman v. Banking Co.*, 84 Ga. 1, 10 S. E. 498.

<sup>248</sup> See *Allerton v. Railroad Co.*, 146 Mass. 241, 15 N. E. 621, and compare *Platt v. Railroad Co.*, 4 Thomp. & C. 406.

applicable as in cases of carriers of goods.<sup>249</sup> When the first carrier is bound to transport only to the end of his line, his liability to a passenger is terminated when that point is reached.<sup>250</sup> If the first carrier runs his trains over the line of a succeeding carrier, the liability for the maintenance of tracks and the operation of the road is the same as for the carrier's own line.<sup>251</sup> The first carrier may, of course, contract to carry the passenger to his destination, though that be beyond the termination of his own line.<sup>252</sup> As to what is evidence of such a contract, the same conflict exists here as with carriers of goods.<sup>253</sup> In some cases the mere sale of a through ticket has been held to make the first carrier liable; that is, that the first carrier is *prima facie* liable for the whole transportation.<sup>254</sup> But the prevailing rule is that such a ticket is only evidence to be considered with other circumstances as establishing a through contract.<sup>255</sup> Whether there is a contract or not, the carrier on whose line the injury or

<sup>249</sup> See ante, p. 463.

<sup>250</sup> *Hartan v. Railroad Co.*, 114 Mass. 44; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; *Kerrigan v. Railroad Co.*, 81 Cal. 248, 22 Pac. 677; *Atchison, T. & S. F. R. Co. v. Roach*, 35 Kan. 740, 12 Pac. 93.

<sup>251</sup> *Great Western Ry. Co. v. Blake*, 7 Hurl. & N. 987; *Buxton v. Railway Co.*, L. R. 3 Q. B. 549; *Thomas v. Railway Co.*, L. R. 5 Q. B. 226. And see, as to a bridge, *Birmingham v. Rochester City & B. R. Co.*, 59 Hun. 583, 14 N. Y. Supp. 13.

<sup>252</sup> *Quimby v. Vanderbilt*, 17 N. Y. 306; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Bussman v. Transit Co.* (Super. Ct. Buff.) 29 N. Y. Supp. 1066; *Carey v. Railroad Co.*, 29 Barb. 35; *Candee v. Railroad Co.*, 21 Wis. 582; *Cherry v. Railroad Co.*, 1 Mo. App. Rep'r, 253; *Nashville & C. R. Co. v. Sprayberry*, 9 Heisk. 852; *Watkins v. Railroad Co.*, 21 D. C. 1. That such a contract is not *ultra vires*, see *Buffett v. Railroad Co.*, 40 N. Y. 168; *Bissell v. Railroad Co.*, 22 N. Y. 258.

<sup>253</sup> See ante, p. 463.

<sup>254</sup> *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; *Najac v. Railroad Co.*, 7 Allen, 329; *Wilson v. Railroad Co.*, 21 Grat. 654; *Candee v. Railroad Co.*, 21 Wis. 582; *Carter v. Peck*, 4 Sneed, 203. The English cases support this rule. *Great Western Ry. Co. v. Blake*, 7 Hurl. & N. 987; *Mytton v. Railroad Co.*, 4 Hurl. & N. 614.

<sup>255</sup> *Hartan v. Railroad Co.*, 114 Mass. 44; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; *Young v. Railroad Co.*, 115 Pa. St. 112, 7 Atl. 741; *Nashville & C. R. Co. v. Sprayberry*, 9 Heisk. 852; *Knight v. Railroad Co.*, 56 Me. 234; *Hood v. Railroad Co.*, 22 Conn. 1. And see *Brooke v. Railroad Co.*, 15 Mich. 332; *Kessler v. Railroad Co.*, 61 N. Y. 538.

delay occurred may, of course, be sued<sup>256</sup> When there is a partnership agreement between the carriers, each one is liable for the defaults of any of the members of the partnership.<sup>257</sup> If the owners of different portions of a public line of travel, by an agreement among themselves, appoint a common agent at each end of the route to receive the fare and give through tickets, this does not of itself constitute them partners as to passengers.<sup>258</sup>

<sup>256</sup> Schopman v. Railroad Co., 9 Cush. 24; Chicago & R. I. R. Co. v. Fahey, 52 Ill. 81; Johnson v. Railroad Co., 70 Pa. St. 357. But see Furstenheim v. Railroad Co., 9 Heisk. (Tenn.) 238.

<sup>257</sup> Bostwick v. Champion, 11 Wend. 571, 18 Wend. 175; Wylde v. Railroad Co., 53 N. Y. 156; Croft v. Railroad Co., 1 McArthur (D. C.) 492; Waland v. Elkins, 1 Starkle, 272; Atchison, T. & S. F. R. Co. v. Roach, 35 Kan. 740, 12 Pac. 93.

<sup>258</sup> Elsworth v. Tartt, 26 Ala. 733. And see Nashville & C. R. Co. v. Sprayberry, 8 Baxt. (Tenn.) 341.

*End Sent March 1. 11*

## CHAPTER IX.

## ACTIONS AGAINST CARRIERS.

- 121. In General.
- 122. Actions against Carriers of Goods.
- 123-126. The Parties.
- 127-128. Form of Action.
- 129. The Pleadings.
- 130. The Evidence.
- 131-137. The Damages.
- 138. Actions against Carriers of Passengers.

## IN GENERAL.

121. Actions against carriers will be considered under two heads:

- (a) Carriers of goods (p. 542).
- (b) Carriers of passengers (p. 560).

## ACTIONS AGAINST CARRIERS OF GOODS.

122. Actions against carriers of goods will be considered with reference to—

- (a) The parties (p. 542).
- (b) The form of action (p. 551).
- (c) The pleadings (p. 554).
- (d) The evidence (p. 555).
- (e) The measure of damages (p. 556).

## SAME—THE PARTIES.

123. An action against a carrier for loss of or damage to goods may be brought by the person entitled to the performance of the duty of safe transportation; that is to say, either—

- (a) By the person with whom the carrier has contracted (p. 543); or
- (b) By the owner of the goods (p. 548).



124. To be more specific, the following rules may be stated:

- (a) Where the contract for transportation is directly with the consignor, he may maintain an action in his own name for a breach; but the recovery is for the benefit of the consignee, if the latter is the real owner of the goods (p. 543).
- (b) *Prima facie* the consignee is the owner of the goods, and the person with whom the contract is made, and therefore entitled to sue for their loss or damage. But this presumption may be rebutted (p. 546).
- (c) A consignee who has no property in the goods, either general or special, and incurs no risk in their transportation, cannot maintain an action for their loss or damage (p. 548).
- (d) The person at whose risk the goods are carried,—that is, the person whose goods they are, and who would suffer if they were lost,—may maintain an action therefor (p. 548).

*Action by Person Contracting with Carrier.*

It is sometimes difficult to determine who is the proper person to sue a carrier when goods received for carriage have been lost or damaged or unreasonably delayed in the delivery under circumstances rendering the carrier liable. Sometimes it has been supposed to depend on the question as to who is at the time the owner of the goods for damage to which the action was brought; at others, great stress has been laid on the question as to who was to pay the freight. But the question as to who were the parties to the contract, and the nature of that contract, have not always been sufficiently regarded.<sup>1</sup> The general rule is that the action should be brought by the person entitled to the performance of the duty. Obviously, the person with whom the carrier has contracted to transport and deliver the goods is entitled to the performance of such duty, and under the rule stated may maintain an action on the contract for a breach thereof.<sup>2</sup> In a very early case before

<sup>1</sup> *Blanchard v. Page*, 8 Gray, 281, 288.

<sup>2</sup> *Swift v. Steamship Co.*, 106 N. Y. 206, 12 N. E. 583; *Dows v. Cobb*, 12

Lord Mansfield (Davis v. James<sup>3</sup>) the decision was properly placed on the ground that the defendants were liable for the consequences to the original consignors, whether the property was in them or not, because the carrier agreed with them to carry the goods safely, and the action was for the breach of that agreement. But, not long after, the case of Dawes v. Peck<sup>4</sup> came before the court, was much discussed, and has long been considered a leading case. It was there rather emphatically stated by Lord Kenyon that the party in whom the legal interest is vested is the proper party in an action against a carrier, "for he is the person who has sustained the loss by the negligence of the carrier; and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured." This was followed by many cases decided on the same grounds, and recognizing the case of Dawes v. Peck as an authority.<sup>5</sup> "But this opinion is now generally dissented from. The person in whom the property in the goods is vested is, it has been said, the proper party to bring the action; but then he is not so because the property is vested in him, but because from that circumstance the law presumes that he is the party who really contracts with the carrier, and that any other person employing the carrier acts only as his

Barb. 310, 316; Ohio & M. R. Co. v. Emrich, 24 Ill. App. 245; Stafford v. Walter, 67 Ill. 83; Great Western R. Co. v. McComas, 33 Ill. 185; Illinois Cent. R. Co. v. Schwartz, 11 Ill. App. 482, 487; Blanchard v. Page, 8 Gray, 281, 295; Atchison v. Railway Co., 80 Mo. 213; Harvey v. Railroad Co., 74 Mo. 538; Davis v. Jacksonville S. E. Line (Mo. Sup.) 28 S. W. 965; Cantwell v. Express Co., 58 Ark. 487, 25 S. W. 503; Hooper v. Chicago & N. W. Ry. Co., 27 Wis. 81; Missouri Pacific Ry. Co. v. Smith, 84 Tex. 348, 19 S. W. 509; Galveston, H. & S. A. Ry. Co. v. Barnett (Tex. Civ. App.) 26 S. W. 782; Carter v. Graves, 9 Yerg. (Tenn.) 446; Goodwyn v. Douglas, Cheves (S. C.) 174; Joseph v. Knox, 3 Camp. 320; Moore v. Wilson, 1 Term R. 659; Davis v. James, 5 Burrows, 2680; Mead v. Railway Co., 18 Wkly. Rep. 735; Dunlop v. Lambert, 6 Clark & F. 600.

<sup>3</sup> 5 Burrows, 2680.

<sup>4</sup> 8 Term R. 330.

<sup>5</sup> Green v. Clarke, 12 N. Y. 343; Griffith v. Ingledew, 6 Serg. & R. 429; Pennsylvania Co. v. Holderman, 69 Ind. 18; South & N. A. R. Co. v. Wood, 72 Ala. 451; Pennsylvania Co. v. Poor, 103 Ind. 553, 3 N. E. 253. The right of stoppage in transitu has been held insufficient to entitle the shipper to sue. Potter v. Lansing, 1 Johns. 215; Krulder v. Ellison, 47 N. Y. 36; Blum v. The Caddo, 1 Woods, 64, Fed. Cas. No. 1,573.

agent. In other words, the owner of the goods is the person who, by presumption of law, makes the contract with the carrier. But if it be shown that another person has made the contract, whether he has any special property in the goods or not, he may maintain the action."<sup>6</sup> The true distinction seems to be that where the action is founded on the contract for the delivery, and the contract is directly with the consignor, the action may be in his name; but where it is in tort for a violation of the right of property it may be brought by the owner. "It would be without example to deny a party to whom an express promise is made, whether as trustee or in his own right, a remedy for its violation. This would produce the singular case of a party's having a right to break an engagement, without responsibility to him with whom it is made, merely because it is possible some other person may have a remedy against him; or, what would be more strange, it would make the very act which consummates the bargain between the shipper and master—that is, the delivery—destroy the remedy of the former on the contract. To whom the goods belong is of no importance if it be once conceded, which cannot be controverted, that the right of property may be in one, while another, by express agreement, may have a remedy for some negligence or misconduct in relation to it."<sup>7</sup> To authorize the consignor to maintain an action against a carrier where he has neither a general nor a special property in the goods shipped, it is not necessary that the carrier's contract with him should be an express one. The implied contract arising out of the delivery to the carrier for transportation in accordance with the consignor's directions is sufficient.<sup>8</sup> The recovery, of course, is for the benefit of the real owner, and will bar a subsequent action by the latter for the same wrong.<sup>9</sup> The rule of Dawes

<sup>6</sup> Hutch. Carr. § 723. See *Blanchard v. Page*, 8 Gray, 281.

<sup>7</sup> *Potter v. Lansing*, 1 Johns. 215.

<sup>8</sup> *Finn v. Railroad Corp.* 112 Mass. 524, 528.

<sup>9</sup> *Southern Exp. Co. v. Craft*, 49 Miss. 480. "The shipper is a party in interest to the contract, and it does not lie with the carrier who made the contract with him to say upon a breach of it that he is not entitled to recover the damages unless it be shown that the consignee objects, for without that it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is, by operation of the rule, regarded as a trustee of an express

v. Peck,<sup>10</sup> that no one can maintain an action for loss or damage of the goods unless he has a general or special property in them, is still followed in a number of states.

*Same—Consignee Presumed to have Contracted with Carrier.*

In the absence of an express contract it is presumed that the carrier is employed by the person at whose risk the goods are carried; that is, the person whose goods they are, and who would suffer if they were lost. Prima facie, this is the consignee, and the consignor is presumed to contract for the transportation as his agent.<sup>11</sup> Both these presumptions may be rebutted.<sup>12</sup> Where the consignee is the owner, and the consignor contracts on his behalf, the consignee may

trust, like a factor or other mercantile agent, who contracts in his own name on behalf of his principal." *Hooper v. Railway Co.*, 27 Wis. 81.

<sup>10</sup> 8 Term R. 330.

<sup>11</sup> *Merchant's Despatch Co. v. Smith*, 76 Ill. 542; *Thompson v. Fargo*, 49 N. Y. 188; *Krulder v. Ellison*, 47 N. Y. 36; *Brower v. Peabody*, 13 N. Y. 121; *Dows v. Greene*, 24 N. Y. 638; *Dows v. Perrin*, 16 N. Y. 325; *Sweet v. Barney*, 23 N. Y. 335; *Frank v. Hoey*, 128 Mass. 263; *Rowley v. Bigelow*, 12 Pick. 306; *Smith v. Lewis*, 3 B. Mon. (Ky.) 229; *Arbuckle v. Thompson*, 37 Pa. St. 170; *Decau v. Shipper*, 35 Pa. St. 239; *Congar v. Railroad Co.*, 17 Wis. 477; *Dyer v. Railway Co.*, 51 Minn. 345, 53 N. W. 714; *Benjamin v. Levy*, 39 Minn. 11, 38 N. W. 702; *McCauley v. Davidson*, 13 Minn. 162 (Gil. 150); *Straus v. Wessel*, 30 Ohio St. 211, 214; *W. & A. R. Co. v. Kelly*, 1 Head (Tenn.) 158; *East Tennessee & G. R. Co. v. Nelson*, 1 Cold. (Tenn.) 272; *E. L. & R. R. Ry. Co. v. Hall*, 64 Tex. 615; *Strong v. Dodds*, 47 Vt. 348, 356; *Grove v. Brien*, 8 How. 429; *Lawrence v. Minturn*, 17 How. 100; *Blum v. The Caddo*, 1 Woods, 64, Fed. Cas. No. 1,573; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Madison, I. & P. R. Co. v. Whitesel*, 11 Ind. 55; *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311, 24 Pac. 284; *Webb v. Winter*, 1 Cal. 417; *South & N. A. R. Co. v. Wood*, 72 Ala. 451; *Dawes v. Peck*, 8 Term R. 330; *Evans v. Marlett*, 1 Ld. Raym. 271; *Coleman v. Lambert*, 5 Mees. & W. 502, 505. As to suit by consignee named in bill of lading, see *Lawrence v. Minturn*, 17 How. 100; *Butler v. Smith*, 35 Miss. 457; *Griffith v. Ingledew*, 6 Serg. & R. 429; *Bonner v. Marsh*, 10 Smedes & M. 376. Suit in admiralty, see *McKinlay v. Morrish*, 21 How. 343, 355; *Houseman v. The North Carolina*, 15 Pet. 40, 49.

<sup>12</sup> *Sweet v. Barney*, 23 N. Y. 335; *Price v. Powell*, 3 N. Y. 322; *Everett v. Saltus*, 15 Wend. 474; *Lawrence v. Minturn*, 17 How. 100; *Congar v. Railroad Co.* 17 Wis. 477, 486; *Smith v. Lewis*, 3 B. Mon. (Ky.) 229; *Southern Exp. Co. v. Caperton*, 44 Ala. 101; *South & N. A. R. Co. v. Wood*, 72 Ala. 451.

maintain an action on the contract, even though he was not disclosed to the carrier at the time the contract was made. An undisclosed principal may maintain an action on a contract made by his agent.<sup>13</sup> Whether the consignor contracted on his own behalf or as agent of the consignee depends primarily, of course, upon the intention of the parties, and this will often be determined with a view to which party has the title to the goods. When goods have been purchased under a contract of sale by the consignee from the consignor, the latter, on delivering them to the carrier, acts merely as the agent of the consignee to employ the carrier, and delivery to the carrier operates as delivery to the consignee, to whom title thereupon passes, and at whose risk they are carried, and he is therefore the proper person to sue.<sup>14</sup> If there has been no contract of sale, and the property in the goods remains in the consignor, he will be the proper person to sue, for he is the person at whose risk they are, and therefore is presumed to have employed the carrier. Such is the case where goods are sent on approval,<sup>15</sup> or without any instructions,<sup>16</sup> or where the sale is not binding on the consignee by reason of the statute of frauds<sup>17</sup> or other cause. But where goods are delivered to a carrier on behalf of the consignee, at his request, or by his direction, either express or implied, the prima facie presumption is that the property in the goods immediately vests in him, and that he is the proper party to sue the carrier either on the contract made by the consignor as his agent, or in tort for the breach of duty on the part of the carrier.<sup>18</sup>

<sup>13</sup> *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 380; *Sanderson v. Lamberton*, 6 Bin. (Pa.) 129; *Elkins v. Railroad Co.*, 19 N. H. 337; *Ames v. Railroad Co.*, 12 Minn. 412 (Gil. 295); *Taintor v. Prendergast*, 3 Hill, 72; *Ford v. Williams*, 21 How. 287.

<sup>14</sup> *Dawes v. Peck*, 8 Term R. 330; *Cork Distilleries Co. v. Great Southern & W. Ry. Co.*, L. R. 7 H. L. 269; *King v. Meredith*, 2 Camp. 639.

<sup>15</sup> *Swain v. Shepherd*, 1 Moody & R. 223.

<sup>16</sup> *Coats v. Chaplin*, 3 Q. B. 483; *Wilson v. Wilson*, 26 Pa. St. 393; *Hays v. Stone*, 7 Hill, 128; *Stone v. Hayes*, 3 Denio, 575.

<sup>17</sup> *Coats v. Chaplin*, 3 Q. B. 483; *Coombs v. Railway Co.*, 3 Hurl & N. 510, 27 L. J. Exch. 401.

<sup>18</sup> *Vale v. Bayle*, Cowp. 294; *Krulder v. Ellison*, 47 N. Y. 36; *People v. Haynes*, 14 Wend. 547. Even though no particular carrier is named. *Dutton v. Solomonson*, 3 Bos. & P. 582; *Cooke v. Ludlow*, 2 Bos. & P. N. R. 119;



*Same—Presumption Where Consignee Has no Interest in Goods.*

Where the consignee has neither a general nor a special property in the goods shipped, and where he had neither personally nor by agents contracted in his own behalf for the transportation, he cannot maintain an action for loss or damage to such goods.<sup>19</sup> There is no presumption, in such a case, that the consignor acted as his agent in contracting for the transportation. But where the consignee has in fact contracted with the carrier for the carriage of goods, although the property in them may not have passed to him by reason of the statute of frauds, he may sue for damages to them.<sup>20</sup>

*Action by Owner.*

The owner of goods shipped by a carrier really sustains the damage from their loss or injury, and there is no doubt that he may maintain an action against the carrier therefor, not because he has any contract with him for the carriage, but because the carrier has the goods lawfully in his possession. It has become his duty to carry them safely, and deliver them to the consignee subject only to a lien for his charges, and a wrongful refusal or failure to do so is a tort for which the owner may maintain an action.<sup>21</sup> It has been seen that the prima facie presumption is that the consignor acted as agent for the owner in contracting for the transportation. Where such presumption is not rebutted, the owner will have an option to sue either upon the contract or in tort for breach of the common-law duty of the carrier.<sup>22</sup> To bring a person within this rule, it is not necessary that he should be the absolute owner of the property. One hav-

Arnold v. Prout, 51 N. H. 587, 589; Garland v. Lane, 46 N. H. 245, 248; Woolsey v. Bailey, 27 N. H. 217; Smith v. Smith, Id. 244, 252; The Mary and Susan, 1 Wheat. 25; Dunlop v. Lambert, 6 Clark & F. 600; Hutch. Carr. §§ 733, 734.

<sup>19</sup> Ogden v. Coddington, 2 E. D. Smith, 317; Coombs v. Railway Co., 3 Hurl. & N. 510; Sargent v. Morris, 3 Barn. & Ald. 277.

<sup>20</sup> Mead v. Railway Co., 18 Wkly. Rep. 735.

<sup>21</sup> Blanchard v. Page, 8 Gray, 281, 289; Griffith v. Ingledew, 6 Serg. & R. 428, 438.

<sup>22</sup> A shipper who is both consignor and consignee is presumptively entitled to maintain an action for loss or injury to the goods. Swift v. Steamship Co., 106 N. Y. 206, 12 N. E. 583.

ing a special property, such as a bailee, may sue.<sup>23</sup> Either the general or special owner, or both of them, may sue in such cases. But a recovery by either will bar a subsequent action by the other.<sup>24</sup>

*Actions for Delay in Delivery and Refusal to Receive Goods.*

In determining the proper party to bring an action against a carrier for wrongful delay the same considerations are applicable as in case of actions for loss or injury. These have already been sufficiently discussed, and will not be repeated. Actions for refusal to receive goods should be brought by the one offering them for carriage.<sup>25</sup>

<sup>23</sup> Illinois Cent. R. Co. v. Miller, 32 Ill. App. 259; Illinois Cent. R. Co. v. Schwartz, 13 Ill. App. 490; Thompson v. Fargo, 44 How. Prac. 176; Steamboat Co. v. Atkins, 22 Pa. St. 522; White v. Bascom, 28 Vt. 268; Denver, S. P. & P. R. Co. v. Frame, 6 Colo. 382. Mere borrower cannot sue. Lockhart v. Railroad Co., 73 Ga. 472. Factors: Boston & M. R. Co. v. Warrior Mower Co., 76 Me. 251; Wolfe v. Railway Co., 97 Mo. 473, 11 S. W. 49. Bailees: Murray v. Warner, 55 N. H. 546, 549; Moran v. Packet Co., 35 Me. 55; Elkins v. Railroad Co., 19 N. H. 337; Great Western R. Co. v. McComas, 33 Ill. 185, 187. A laundress delivering laundry to a carrier for transportation to the owner may maintain an action for its loss. Freeman v. Birch, 1 Nevile & M. 420, 3 Q. B. 492, 43 E. C. L. 835. Agents: Southern Exp. Co. v. Caperton, 44 Ala. 101.

<sup>24</sup> Green v. Clarke, 12 N. Y. 343; Illinois Cent. R. Co. v. Miller, 32 Ill. App. 259; Illinois Cent. R. Co. v. Schwartz, 13 Ill. App. 490; Murray v. Warner, 55 N. H. 546, 549; Elkins v. Railroad Co., 19 N. H. 337; Denver, S. P. & P. R. Co. v. Frame, 6 Colo. 382; Green v. Clarke, 12 N. Y. 343; Southern Exp. Co. v. Caperton, 44 Ala. 101; The Farmer v. McCraw, 26 Ala. 189. The rule is that either the bailor or the bailee may sue, and, whichever first obtains damages, it is a full satisfaction. Murray v. Warner, 55 N. H. 546, 549; Elkins v. Railroad Co., 19 N. H. 337; White v. Bascom, 28 Vt. 268; Nicolls v. Bastard, 2 Cromp., M. & R. 659.

<sup>25</sup> Cobb v. Railroad Co., 38 Iowa, 601; Lafaye v. Harris, 13 La. Ann. 553; Pittsburgh, C. & St. L. Ry. Co. v. Morton, 61 Ind. 539; Pittsburgh, C., C. & St. L. Ry. Co. v. Racer, 5 Ind. App. 209.

125. Actions for delay or loss or injury must be brought against the carrier undertaking the transportation, and not against a mere servant or agent.

**EXCEPTION**— The master of a vessel may be sued as well as the owner, but they cannot be joined.

126. Actions for refusal to receive goods must be brought against the carrier holding himself out as ready to carry for all.

*Actions for Loss or Injury or Delay.*

On familiar principles, the action for loss or injury or delay of the goods shipped must be brought against the carrier undertaking the transportation, and not against his mere servant or agent.<sup>26</sup> This is because the duty violated is the duty of the carrier, and not the duty of the servant. Where, however, the transportation is without the scope of the carrier's business, but the servant, without authority, nevertheless undertakes it, he, and not the carrier, is liable;<sup>27</sup> as is also the case where the property is delivered to a servant to carry for his own profit, and not his master's.<sup>28</sup> In both cases it is obvious that no duty rests on the master. There is one important exception, however, to the general rule, and this is in the case of the master of a vessel. For reasons of public policy growing out of the confidence necessarily reposed in the master, and his exceptional opportunities to safely commit frauds,<sup>29</sup> he is regarded as a common carrier,<sup>30</sup> and is equally liable with the owner of the vessel.<sup>31</sup> Either he or the owner may be sued for loss or injury. But they cannot be joined.<sup>32</sup>

<sup>26</sup> *Williams v. Cranston*, 2 Starkie, 82, 3 E. C. L. 326.

<sup>27</sup> *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 17, 34, Fed. Cas. No. 2,730; *Shelden v. Robinson*, 7 N. H. 157; *Elkins v. Railroad Co.*, 23 N. H. 275.

<sup>28</sup> *Butler v. Basing*, 2 Car. & P. 613, 12 E. C. L. 764. See *Williams v. Cranston*, 2 Starkie, 82, 3 E. C. L. 326, remarks per Ellenborough.

<sup>29</sup> *Elliott v. Russell*, 10 Johns. 1; *Watkinson v. Laughton*, 8 Johns. 164.

<sup>30</sup> *McClures v. Hammond*, 1 Bay (S. C.) 99; *Schieffelin v. Harvey*, 6 Johns. 170; *Watkinson v. Laughton*, 8 Johns. 164; *Elliott v. Russell*, 10 Johns. 1; *Bell v. Reed*, 4 Bin. (Pa.) 27.

<sup>31</sup> *Boson v. Sandford*, 1 Show. 28; *Mors v. Sluce*, 1 Mod. 85; *Patton v. Magrath*, 1 Rice (S. C.) 162; *Priestly v. Fernie*, 11 Jur. (N. S.) 813, 34 L. J. Exch. 172. *Contra*, *Walston v. Myers*, 5 Jones (N. C.) 174.

<sup>32</sup> *Patton v. Magrath*, 1 Rice (S. C.) 162; *Rich v. Coe*, Cowp. 636.

Their liability rests on different grounds. A recovery against one bars an action against the other.<sup>33</sup>

*Actions for Refusal to Receive.*

Actions for refusal to receive should be brought against the carrier holding himself out as ready to carry for all, because it is his duty that is violated.

*Connecting Carriers.*

Where goods are shipped over connecting lines, the rules as to parties correspond to the rules of substantive liability already discussed.

SAME—FORM OF ACTION.

127. A common carrier may be sued either *ex contractu* or *ex delicto* for breach of his duty to transport and deliver safely, and within a reasonable time.

128. An action for refusal to receive goods must be brought *ex delicto*, in the absence of a special contract between the parties.

Originally, a common carrier's liability was thought to rest exclusively upon his common-law duty to receive and to transport and deliver safely. A breach of this duty constituted a tort, and an action on the case was the proper remedy.<sup>35</sup> The right of a shipper to sue a common carrier upon his contract to carry and deliver was first recognized in the case of *Dale v. Hall*,<sup>36</sup> since which time a person contracting with a common carrier has had a choice of remedies. He may sue either in *assumpsit* for breach of the contract, or in *tort* (case) for the breach of the common-law duty.<sup>37</sup>

<sup>33</sup> *Priestly v. Fernie*, 11 Jur. (N. S.) 813, 34 Law J. Exch. 172.

<sup>35</sup> *Hutch. Carr.* § 738.

<sup>36</sup> 1 Wils. 281. And see *Ansell v. Waterhouse*, 2 Chit. 1, 18 E. C. L. 469, 6 Maule & S. 385.

<sup>37</sup> *Orange Bank v. Brown*, 3 Wend. 158; *Lamb v. Transportation Co.*, 2 Daly, 454; *Catlin v. Adirondack Co.*, 11 Abb. N. C. 377, *Atlantic Mut. Ins. Co. v. McLoon*, 48 Barb. 27; *Smith v. Seward*, 3 Pa. St. 342; *Coles v. Railroad Co.*, 41 Ill. App. 607; *Wabash, St. L. & P. Ry. Co. v. McCasland*, 11 Ill. App. 491; *St. Louis, I. M. & S. Ry. v. Heath*, 41 Ark. 476; *Baltimore & O. R. Co. v. Pumphrey*, 59 Md. 390; *Mississippi Cent. R. Co. v. Fort*, 44 Miss. 423; *School*

Each form of action has its own peculiar advantages. For example, where it is uncertain who should be made defendants, the wisest course is to bring the action in tort, because in tort it is immaterial whether there are too many or too few defendants,—the plaintiff recovers against those who are proved guilty;<sup>38</sup> whereas, if the action is in assumpsit on the contract, a misjoinder or non-joinder of parties is fatal to a recovery.<sup>39</sup> This distinction was well brought out in an action against a public carrier of passengers, and the rule is the same with respect to common carriers. The action was brought in case against ten defendants, and the verdict was rendered against eight of the defendants and in favor of the other two. The question was raised whether a judgment entered on such a verdict could stand. Dallas, C. J., said: "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it. \* \* \* The action of assumpsit, as applied to cases of this kind, is of modern use. If the

Dist. v. Boston, H. & E. R. Co., 102 Mass. 552, 555; The Queen of the Pacific, 61 Fed. 213; Whittenton Manuf'g Co. v. Memphis & O. R. P. Co., 21 Fed. 896; The Grapeshot, 22 Fed. 123; The Samuel J. Christian, 16 Fed. 796; Ansell v. Waterhouse, 6 Maule & S. 385, 2 Chit. 1, 18 E. C. L. 469. A special contract with the carrier will not preclude the shipper from suing in case without referring to the contract. Clark v. Richards, 1 Conn. 53, 59; Arnold v. Railroad Co., 83 Ill. 273; Clark v. Railway Co., 64 Mo. 440; Oxley v. Railway Co., 65 Mo. 629; Coles v. Railroad Co., 41 Ill. App. 607; Wabash, St. L. & P. Ry. Co. v. Pratt, 15 Ill. App. 177. But see Kimball v. Railroad Co., 26 Vt. 247.

<sup>38</sup> Orange Bank v. Brown, 3 Wend. 158; Cabell v. Vaughan, 1 Saund. 291a, 291e; Ansell v. Waterhouse, *supra*; Jones v. Pitcher, 3 Stew. & P. 135; Holsapple v. Railroad Co., 86 N. Y. 275; Mitchell v. Tarbutt, 5 Term R. 649; Smith v. Seward, 3 Pa. St. 342, 345; Patton v. Magrath, 1 Rice (S. C.) 162; Pozzi v. Shipton, 8 Adol. & E. 963, 35 E. C. L. 931. Connecting carriers, see Baker v. Railroad Co., 42 Ill. 73.

<sup>39</sup> Smith v. Seward, 3 Pa. St. 342; Mershon v. Hobensack, 22 N. J. Law, 372; Patton v. Magrath, 1 Rice (S. C.) 162; Pozzi v. Shipton, 8 Adol. & E. 963.



action be not founded on a contract, but on a breach of duty depending on the common law, on a tort or misfeasance, it cannot be contended that the judgment is erroneous; for from the nature of the case and the form of the action it is several, and not joint, and may be maintained against some, only, of those against whom it is brought."<sup>40</sup> So, also, in actions on the case it is not necessary to plead the circumstances with the same particularity and certainty as is required in assumpsit, and therefore the danger of a variance between the pleadings and proof is not so great.<sup>41</sup> Again, where the action is in case, a count in trover may be joined, which is sometimes an advantage;<sup>42</sup> whereas trover, being an action *ex delicto*, cannot be joined with a count in assumpsit.<sup>43</sup> The action of assumpsit, on the other hand, has the advantage of not abating upon the death of either party, but it survives in favor of or against their respective representatives.<sup>44</sup> So, also, the common counts may be

<sup>40</sup> *Bretherton v. Wood*, 3 Brod. & B. 54

<sup>41</sup> *Weed v. Railroad Co.*, 19 Wend. 534.

<sup>42</sup> *Dickon v. Clifton*, 2 Wils. 319; *Dwight v. Brewster*, 1 Pick. (Mass.) 50; *Wyld v. Pickford*, 8 Mees. & W. 443; *Govett v. Radnidge*, 3 East, 62, 69. Trover is not the proper remedy for loss of goods. *Ross v. Johnson*, 5 Burrows, 2825; *Kirkman v. Hargreaves*, 1 Selw. N. P. (10th Ed.) 411; *Anon.*, 2 Salk. 665; *Bowlin v. Nye*, 10 Cush. (Mass.) 416. Trover lies for wrongful delivery to third person. *Viner v. Steamship Co.*, 50 N. Y. 23; *Bush v. Romer*, 2 Thomp. & C. (N. Y.) 597; *Hawkins v. Hoffman*, 6 Hill, 586; *Llbbv v. Ingalls*, 124 Mass. 503; *Humphreys v. Reed*, 6 Whart. 434; *Shenk v. Steam Propeller Co.*, 60 Pa. St. 109; *Bullard v. Young*, 3 Stew. 46; *Stephenson v. Hart*, 4 Bing. 476; *Illinois Cent. R. Co. v. Park*, 54 Ill. 294; *Indianapolis & St. L. R. Co. v. Herndon*, 81 Ill. 143; *St. Louis & T. H. R. Co. v. Rose*, 20 Ill. App. 670. Also for refusal to deliver. *Northern Transportation Co. v. Sellick*, 52 Ill. 249; *Adams v. Clark*, 9 Cush. 215; *Richardson v. Rich*, 104 Mass. 156, 159; *Packard v. Getman*, 6 Cow. (N. Y.) 757; *Long v. Railroad Co.*, 51 Ala. 512; *Hunt v. Haskell*, 24 Me. 339; *Louisville & N. R. Co. v. Lawson*, 88 Ky. 496, 11 S. W. 511; *Erie Dispatch v. Johnson*, 87 Tenn. 490, 11 S. W. 441; *Lewis v. Railroad Co.*, 20 Minn. 260 (Gil. 234); *Marsh v. Railway Co.*, 9 Fed. 873. See, also, *Ostrander v. Brown*, 15 Johns. 39. Trover lies where carrier has sold goods for freight. *Sullivan v. Park*, 33 Me. 488; *Briggs v. Railroad Co.*, 6 Allen, 246.

<sup>43</sup> *Coryton v. Lithebye*, 2 Saund. 115, and note. See, also, *Hoagland v. Railroad Co.*, 39 Mo. 451; *Colwell v. Railroad Co.*, 9 How. Prac. 311.

<sup>44</sup> *Hamblly v. Trott*, Cowp. 371, 375; *Hutch. Carr.* § 743.

joined, which is a distinct advantage.<sup>45</sup> Of course, where the carrier's liability is dependent upon a special contract, as where the contract imposes upon the carrier some duty or obligation not already imposed by the common law, the action should be upon the contract, and not in case upon the tort. The form of action may also affect the measure of damages. By the modern codes abolishing the different forms of action, and establishing one form, called a "civil action," these distinctions have been very generally rendered unimportant. They are still in force to a greater or less extent, however, in a few of the states.

*Action for Refusal to Receive Goods.*

The duty to receive all goods offered for transportation is imposed by the common law, and its breach is a tort. Obviously, a refusal to receive goods offered does not ordinarily involve a breach of contract, and the action must therefore be in case.<sup>46</sup> But there may be a special contract between the parties, of which a refusal to receive goods would constitute a breach. In such a case an action may, of course, be brought on the contract.<sup>47</sup>

## 129. SAME—THE PLEADINGS.

It has been seen that actions against common carriers may be either *ex contractu* or *ex delicto*, according as the wrong relied on is a breach of a contract duty or a duty imposed by law. The pleadings must, of course, be appropriate to the form of action adopted. In code states the matter is no longer one of importance. It is beyond the scope of this book to discuss pleading either under the codes or at common law. There are no principles peculiar to actions against carriers. It is sufficient to say that the plaintiff must allege all facts necessary to show the existence of a duty owed to him by defendant, its violation, and resulting damage.

<sup>45</sup> Ang. Carr. § 435; Hutch. Carr. § 743; 1 Chit. Pl. 114, 418.

<sup>46</sup> *Pickford v. Railway Co.*, 8 Mees. & W. 372; *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488; *Pittsburgh, C. & St. L. R. Co. v. Morton*, 61 Ind. 539.

<sup>47</sup> *Pittsburgh, C. & St. L. Ry. Co. v. Hays*, 49 Ind. 207; *Texas P. Ry. Co. v. Nicholson*, 61 Tex. 491; *Northwestern Fuel Co. v. Burlington, C. R. & N. R. Co.*, 20 Fed. 712.

## 130. SAME—THE EVIDENCE.

No general rule can be stated in regard to the evidence admissible and necessary in actions against carriers. All facts necessary to establish the carrier's liability must be shown. In actions for loss or injury, plaintiff must show (1) delivery of the goods to the carrier (2) an undertaking on the part of the carrier to transport them safely, and (3) a failure to do so. These three things must be shown whether the action be *ex contractu* or *ex delicto*.<sup>48</sup> No liability for the goods attaches to the carrier until they have been delivered to him and he has undertaken to transport them.<sup>49</sup> What constitutes a sufficient delivery has already been shown.<sup>50</sup> The undertaking or contract to carry may be either express or implied.<sup>51</sup> It will be implied from proof of a delivery to the carrier with instructions as to the transportation, and acceptance by him. This implied contract arises only in case of a delivery to a common carrier.<sup>52</sup> In the case of private carriers an express contract must be shown.<sup>54</sup> The plaintiff must show whose default caused the loss. In the case of successive carriers, plaintiff must single out the one responsible for the loss, unless, of course, the first carrier undertook to carry the goods through to their destination, or the successive carriers are partners.<sup>55</sup>

The subject of burden of proof has already been discussed in connection with the specific treatment of the various questions that arise.

<sup>48</sup> Hutch. Carr. § 759.

<sup>49</sup> See ante, p. 314.

<sup>50</sup> See ante, p. 316.

<sup>51</sup> Hutch. Carr. § 762. From the necessity of proving an undertaking, either express or implied, a contract, though in form *ex delicto*, is sometimes called an action *ex delicto quasi ex contractu*. *Orange Bank v. Brown*, 3 Wend. 158. And see *Allen v. Sewall*, 2 Wend. 327; *Boson v. Sandford*, 2 Show. 478.

<sup>52</sup> *Marshall v. Railway Co.*, 11 C. B. 655; *Pozzi v. Shipton*, 8 Adol. & E. 963; *Orange Bank v. Brown*, 3 Wend. 158.

<sup>54</sup> *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165; 2 Greenl. Ev. § 210.

<sup>55</sup> *Midland Ry. Co. v. Bromley*, 17 C. B. 372; *Gilbart v. Dale*, 5 Adol. & E. 543; *Anchor Line v. Dater*, 68 Ill. 369. See, also, *Muschamp's Case*, 8 Mees. & W. 421; *Chicago & N. W. R. Co. v. Northern Line Packet Co.*, 70 Ill. 217.

## SAME—THE DAMAGES.

131. The measure of damages for refusal to receive and transport goods is the difference between the value of the goods at the time and place of refusal and what would have been their value at the time and place where they should have been delivered.
132. If other reasonable mode of conveyance can be procured, the measure of damages is the increased cost of transportation.

The object of all transportation is to have the use of or an opportunity to sell the goods at the place of destination. The damages for a wrongful refusal to transport goods is, therefore, the value to the shipper of having them at the point of destination. This will ordinarily be the difference between the value of the goods at the time and place of refusal and their value at the place of destination at the time they should have been delivered there.<sup>56</sup> Thus, where a carrier agreed to transport lumber, railroad ties, etc., from Canada to Boston, and failed to do so, the measure of damages was held to be the difference between the market price in Boston and Canada at the time when the defendant should have performed, less the cost of transportation.<sup>57</sup> But damages cannot be recovered for consequences that might have been avoided by the exercise of reasonable diligence on the part of the plaintiff. Therefore, if other means of transportation may be had, and the circumstances are such that a reasonably prudent man would forward the goods by those means, the measure of damages is the increased expense of transportation by such means;<sup>58</sup>

<sup>56</sup> Pennsylvania R. Co. v. Titusville & P. P. R. Co., 71 Pa. St. 350; Galena & C. U. R. Co. v. Rae, 18 Ill. 488; Harvey v. Railroad Co., 124 Mass. 421; Bridgman v. The Emily, 18 Iowa, 509; Wards C. & P. L. Co. v. Elkins, 34 Mich. 439; O'Conner v. Forster, 10 Watts, 418.

<sup>57</sup> Harvey v. Railroad Co., 124 Mass. 421.

<sup>58</sup> O'Conner v. Forster, 10 Watts, 418; Ogden v. Marshall, 8 N. Y. 340; Grund v. Pendergast, 58 Barb. 216; Higginson v. Weld, 14 Gray, 165; Crouch v. Railway Co., 11 Exch. 742.

and, if such means is no more expensive, and is equally convenient, only nominal damages can be recovered.<sup>59</sup>

**133. The measure of damages for total loss or nondelivery is the value of the goods at the time and place they should have been delivered.**

Obviously, the natural and probable consequences of a failure to deliver the goods at their destination is a loss to the owner, amounting to the value of the goods at that point, and such value is therefore the measure of damages.<sup>60</sup> Ordinarily, value means market value, but where goods have no market value their value to the owner may be recovered.<sup>61</sup>

**134. The measure of damages for injury to goods in transit is the difference between the value of the goods at the time and place of delivery in their damaged condition and what their value would have been had they been delivered in good order.**

Where there is a total failure to deliver the goods, the owner's loss is their real value. It is obvious that if the goods are delivered to the consignee, but in a damaged condition, the actual loss is diminished by an amount equal to the value of the damaged goods received, and the difference between this value and what the value would have been had the goods been delivered uninjured is the measure of damages.<sup>62</sup> Thus, butterine shipped to New Orleans was damaged in transit, through the carrier's negligence. On its arrival its market

<sup>59</sup> 3 Suth. Dam. § 899.

<sup>60</sup> *Rodocanachi v. Milburn*, 18 Q. B. Div. 67. Cf. *Magnin v. Dinsmore*, 56 N. Y. 168, 62 N. Y. 35, and 70 N. Y. 410. See, also, *Faulkner v. Hart*, 82 N. Y. 413; *Spring v. Haskell*, 4 Allen, 112; *Sangamon & M. R. Co. v. Henry*, 14 Ill. 156.

<sup>61</sup> Cf. *Rodocanachi v. Milburn*, 18 Q. B. Div. 67.

<sup>62</sup> *Notara v. Henderson*, L. R. 7 Q. B. 225; *Chicago, B. & Q. R. Co. v. Hale*, 83 Ill. 300; *Brown v. Steamship Co.*, 147 Mass. 58, 16 N. E. 717; *Louisville & N. R. Co. v. Mason*, 11 Lea, 116; *Magdeburg General Ins. Co. v. Paulson*, 29 Fed. 530; *The Mangalore*, 23 Fed. 463. See *Morrison v. Steamship Co.*, 36 Fed. 569, 571; *The Compta*, 5 Sawy. 137, Fed. Cas. No. 3,070.



value in its damaged condition was  $7\frac{1}{2}$  cents per pound, at which price it was sold. Had it been in good order, its market value would have been 15 or 16 cents a pound. It was held that plaintiff was entitled to the difference with interest.<sup>63</sup>

135. The measure of damages for delay is the difference between the value of the goods at the time and place fixed for delivery and their value at the time and place of actual delivery.

136. Where the value of the goods is not diminished by the delay, the measure of damages is the value of their use during the period of delay.

The first rule is well illustrated by a leading English case.<sup>64</sup> A cap manufacturer delivered to a carrier cloth bought to make up into caps to be carried to M. Owing to an unreasonable delay in delivery, the cloth was received too late for use that season. The carrier knew nothing with reference to plaintiff's business or intentions. It was held that the measure of damages for the delay was not the profits plaintiff might have made, but the diminution in value of the goods owing to the time for finding customers having passed.<sup>65</sup>

<sup>63</sup> *Western Manuf'g Co. v. The Guiding Star*, 37 Fed. 641.

<sup>64</sup> *Wilson v. Railway Co.*, 9 C. B. (N. S.) 632.

<sup>65</sup> See, also, *Cutting v. Railway Co.*, 13 Allen, 381; *Weston v. Railway Co.*, 54 Me. 376; *Sherman v. Railroad Co.*, 64 N. Y. 254; *Scott v. Steamship Co.*, 106 Mass. 468; *Collard v. Railway Co.*, 7 Hurl. & N. 79; *Ayres v. Railway Co.*, 75 Wis. 215, 43 N. W. 1122; *Ingledeu v. Railroad Co.*, 7 Gray, 86. Money spent looking for goods may be recovered. *Hales v. Railway Co.*, 4 Best & S. 66. Cf. *Woodger v. Railway Co.*, L. R. 2 C. B. 318. Where goods have been resold and the carrier notified of the price, such price is to be taken as their true value, *Deming v. Railroad Co.*, 48 N. H. 455, 470; but where the carrier is not notified of such price, the market price is considered their true value, *Horne v. Midland Ry. Co.*, L. R. 8 C. P. 131; Cf. *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128, where shipper was allowed to recover on basis of contract price. Where goods have been sold "to arrive," and the market value at the time when they should have arrived was greater than the contract price, recovery has been allowed on the basis of market value. *Rodocanachi v. Milburn*, L. R. 18 Q. B. Div. 67.

The second rule is illustrated by an action for delay in forwarding money. The measure of damages was held to be interest on the money during the period of delay.<sup>66</sup> So in an action for delay in delivering machinery, the measure of damages was said to be the value of the use of the machinery, or the sum for which plaintiff might have hired like machinery.<sup>67</sup>

**137. Consequential damages arising from a carrier's default may be recovered provided they are natural and probable consequences of the breach of duty.**

In the case of all of the rules heretofore stated with reference to the measure of damages, the damages allowed have been for losses directly caused by the carrier's breach of duty. But consequential or indirect damages arising from such breaches of duty may also be recovered, provided they are natural and probable consequences. The following rules may be stated: Damages beyond the difference in market values will not be allowed unless the consequences of a default are communicated to or known by the company at the time and place of delivery to them. Only such losses can be recovered as were reasonably contemplated by both parties at the time the contract for carriage was made as likely to arise from a breach, and not losses arising out of circumstances then wholly unknown to the carrier. Damages will be given only for the reasonable and proximate, and not for the remote, consequences of the breach of duty.<sup>68</sup>

<sup>66</sup> U. S. Exp. Co. v. Haines, 67 Ill. 137.

<sup>67</sup> Priestly v. Railroad Co., 26 Ill. 206.

<sup>68</sup> Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458; Hadley v. Baxendale, 9 Exch. 341.

## ACTIONS AGAINST CARRIERS OF PASSENGERS.

## 138. Actions against carriers of passengers will be considered with reference to —

- (a) The parties (p. 560).
- (b) The form of action (p. 561).
- (c) The pleadings (p. 562).
- (d) The evidence (p. 562).
- (e) The measure of damages (p. 562).

*The Parties.*

Ordinarily, a passenger carrier's duty is confined to the passenger, and he alone can sue for its breach. At common law, the passenger himself was the only one who could sue for a personal injury, and in case of his death before recovery the right of action died with him, and did not survive to his personal representatives. Under the statute of laborers (23 Edw. III. 1349), however, grew up what are known as the "per quod actions," because of the peculiar wording of the pleadings. The action lay under the statute by the employer against a third person who interfered with the relationship of his servant, "per quod servitium amisit."<sup>69</sup> This action was easily adapted so as to be used by a parent for an injury to his child, or by a husband for injury to his wife. In theory the damages given in this class of cases are limited to compensation for the services lost, the right of action for the injury to the person being in the injured party, and ceasing to exist upon his death.<sup>70</sup> Where the injury resulted in instant death, no action could be maintained, for the right to services ceases at the instant of death, so that the parent, husband, or master is deprived of no service to which he can be said to have a right.<sup>71</sup> This defect of the common law was remedied in England by Lord Campbell's act,<sup>72</sup> which enacted that, "wherever the death of a person shall be caused by

<sup>69</sup> Jag. Torts, p. 447.

<sup>70</sup> Hall v. Hollander, 4 Barn. & C. 660.

<sup>71</sup> Wood, Mast. & S. § 223; Grosso v. Delaware, L. & W. R. Co., 50 N. J. Law, 317, 13 Atl. 233; Connecticut Mut. Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265; Hyatt v. Adams, 16 Mich. 180.

<sup>72</sup> 9 & 10 Vict. c. 93.

wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony"; that "every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; that in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whose benefit such action shall be brought; and that the amount so recovered, and deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct." Similar acts have been enacted in all the states of this country. It is beyond the scope of this book to discuss these statutes. Though they all have many features in common, these details are infinitely various. The proper party to bring the action must be determined from the particular statute under which a recovery is sought.

#### *Form of Action.*

A passenger injured by a breach of the carrier's obligations to him has the same choice of remedies as exists in the case of carrier of goods, and the action will be brought either in assumpsit on the express or implied contract or in case for the tort.<sup>73</sup> The different forms of actions have the same advantages and disadvantages when the action is for injury to a passenger as when it is for an injury to goods.<sup>74</sup> Where it is doubtful whether the action in any particular case is to be regarded as one in assumpsit or in case, the leaning of the courts is to consider the action one in case founded on the breach

<sup>73</sup> Hutch. Carr. § 790; *Knights v. Quarles*, 2 Brod. & B. 102; *Pennsylvania R. Co. v. Peoples*, 31 Ohio, 537.

<sup>74</sup> See ante, p. 552.

of duty.<sup>75</sup> Where exemplary damages are sought, the declaration must be on the tort, and not in assumpsit.<sup>76</sup>

*Pleading and Evidence.*

There are no principles of pleading peculiar to actions against carriers of passengers. They must, of course, be appropriate to the form adopted and conform to the usual rules. The burden of proof upon the various questions which may arise in actions against carriers of passengers has already been discussed in connection with the specific treatment of each question; otherwise the ordinary principles of evidence apply.<sup>77</sup>

*The Measure of Damages.*

"The obligations or responsibilities of public carriers do not arise altogether nor mainly out of contracts; they are principally imposed by law. The refusal to undertake the conveyance of a passenger without excuse, or when actionable, is merely a violation of a carrier's duty. He has refused to contract. So his duty to carry with care, though it may to some extent be regulated and restricted by contract, is imposed by law, and cannot, as is generally held, be contracted away. Hence actions against these carriers are generally in tort for negligence, or for misconduct involving a breach of duty. Contracts, however, are usually made fixing the extent of the route, the mode of conveyance, the kind of accommodations, the time, etc.; and, therefore, actions founded upon such contracts may be maintained. Whether the action be upon the breach of duty or for violation of contract, to the extent that they involve the same acts and omissions, the damages as measured by law are substantially the same."<sup>78</sup> The consequences in this class of cases fall directly upon

<sup>75</sup> Hutch. Carr. § 795; *Heirn v. McCaughan*, 32 Miss. 17; *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660. "And at common law, in the absence of an express contract or promise, 'if from a given state of facts the law raises a legal obligation to do a particular act, and there was a breach of that obligation, and a consequential damage, although assumpsit might be maintained upon the implied promise,' the more appropriate form of action was in case." Hutch. Carr. § 795. See *Chit. Pl.* 135; *Burnett v. Lynch*, 5 Barn. & C. 589.

<sup>76</sup> *Thomp. Carr.* p. 546, § 5; *Id.* p. 573, § 27.

<sup>77</sup> See *ante*, pp. 526, 540.

<sup>78</sup> 3 *Suth. Dam.* § 934.



the person, and in most cases are not distinguishable from those of a tort. In either tort or contract the damages are measured by the probable or natural consequences of the wrong, but the natural and probable consequences of a breach of contract must be determined with regard to all the facts known to the parties at the time the contract was made. Thus in *Hobbs v. Railway Co.*<sup>79</sup> it appeared that plaintiff, with his wife and children, were set down at the wrong station, and, being unable to get a conveyance, they were obliged to walk, the wife catching a severe cold. It was held that there could be no recovery for the expense of the illness, because it was not within the contemplation of the parties, nor a probable consequence of having to walk home. The action was on the contract. The authority of this decision was much shaken by the opinions of Bramwell and Brett, L. J., in *McMahon v. Field*,<sup>80</sup> and has been practically neutralized in most states by holding that it does not apply where the action sounds in tort; and cases of this character have been almost always treated as sounding in tort.<sup>81</sup> Thus, in an action for neglect to transport a passenger across the isthmus of Panama according to contract, the plaintiff was allowed to recover the expense of a subsequent illness caused by being left in that unhealthy country.<sup>82</sup> *Brown v. Railway Co.*<sup>83</sup> was a case very similar to the *Hobbs* Case. In an elaborate opinion the court reached a conclusion directly opposite to that reached in the *Hobbs* Case. Mr. Sedgwick has admirably stated the pith of the whole matter as follows: "Upon the whole, these cases seem to illustrate very strongly a point upon which too much insistence cannot be laid,—that the case of *Hadley v. Baxendale* intro-

<sup>79</sup> 10 Q. B. 111.

<sup>80</sup> 7 Q. B. Div. 591.

<sup>81</sup> *Alabama G. S. R. Co. v. Heddleston*, 82 Ala. 218, 3 South. 53; *Baltimore C. P. Ry. Co. v. Kemp*, 61 Md. 74, 619; *Heirn v. McCaughan*, 32 Miss. 17; *Yorton v. Railway Co.*, 62 Wis. 367, 21 N. W. 516, and 23 N. W. 401. It has been fully followed in some jurisdictions. *Pullman Palace Car Co. v. Barker*, 4 Colo. 344; *Murdock v. Railroad Co.*, 133 Mass. 15. It has been said, where the breach of contract was not also a tort, the rule in *Hobbs's Case* will apply. 2 Sedg. Dam. § 868; *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474; *Brown v. Railway Co.*, 54 Wis. 342, 11 N. W. 356, 911. No such case has been found.

<sup>82</sup> *Williams v. Vanderbilt*, 28 N. Y. 217.

<sup>83</sup> 54 Wis. 342, 11 N. W. 356, 911.

duced no new rule of damages. For proximate and natural consequences of the defendant's act, whether it be a breach of contract or of tort, a recovery can always be had. The only meaning of the rule with regard to the contemplation of the parties is that in contract a particular species of proof as to special consequences is often available, which is not so in tort."<sup>84</sup>

*Same—Exemplary Damages and Mental Suffering.*

There is another light in which the form of action becomes important. Where the action is upon the contract, exemplary damages cannot be recovered;<sup>85</sup> but where the action is for a tort, founded on a breach of the public duty, exemplary damages may be given in proper cases.<sup>86</sup> So, also, it is usually held that damages for mental suffering cannot be recovered in an action on a contract,<sup>87</sup> though the rule is far from being settled, and is denied by many courts of ability.<sup>88</sup>

*Same—Personal Injury.*

In actions for personal injury to a passenger the measure of damages is usually the same as in ordinary cases of personal injury. Compensatory damages for pain, mental and physical, and for loss of time, medical expenses, diminution of earning power, and the like, may always be recovered.<sup>89</sup> Damages cannot be recovered for mere fright, but, when a nervous shock naturally results in physical injury, damages may be recovered therefor.<sup>90</sup>

*Same—Failure to Carry Passenger—Delay.*

Damages for failure to transport a passenger include compensation for the increase of cost of carriage by another conveyance, the

<sup>84</sup> 2 Sedg. Dam. § 871.

<sup>85</sup> *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660; *Hamlin v. Railway Co.*, 1 Hurl. & N. 408, 411.

<sup>86</sup> *Helrn v. McCaughan*, 32 Miss. 17; *Thomp. Carr.* p. 546, § 5; *Id.*, p. 573, § 27.

<sup>87</sup> *Walsh v. Railway Co.*, 42 Wis. 23.

<sup>88</sup> See able note by H. Campbell Black in 11 C. C. A. 556. Also able note by William L. Clark, Jr., in 15 C. C. A. 235.

<sup>89</sup> Sedg. Dam. § 860. See, also, *Id.* § 481 et seq.

<sup>90</sup> *Bell v. Railway Co.*, 26 L. R. Ir. 428; *Victorian Ry. Com'rs v. Coultas*, L R. 13 App. Cas. 222.

- Recover for (1) Diminished earning capacity,  
 (2) Mental and physical suffering,  
 (3) Loss of time  
 (4) Medical attention

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- (5) Usually no recovery for mental suffering unless accompanied by physical suffering or injury

loss of time, and other ordinary expenses of delay.<sup>91</sup> Plaintiff can incur only reasonable expense in avoiding the consequences of the delay.<sup>92</sup> Whether or not plaintiff would have adopted the course he should have adopted if the delay had occurred through his own fault, and he had not the carrier to look to for compensation, has been suggested as a test of reasonableness.<sup>93</sup> Substantially the same principles are applicable in actions for delay.

*Same—Failure to Carry to Destination—Wrongful Ejection.*

Where a carrier fails to carry a passenger to his destination, and sets him down at some intermediate point, compensation may be recovered for all the expenses of delay,<sup>94</sup> including loss of time<sup>95</sup> and cost of a reasonable conveyance to his destination.<sup>96</sup> He may also recover compensation for the indignity of the expulsion from the train, and, if there are aggravating circumstances, he may recover exemplary damages.<sup>97</sup> Where, by the fault of the carrier's agents, and without the passenger's fault, the ticket of the passenger is not such a one as he should have to entitle him to passage, the carrier will be liable in damages for expelling him.<sup>98</sup> It is an interesting question to determine the true measure of damages in

<sup>91</sup> Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052; Eddy v. Harris, 78 Tex. 661, 15 S. W. 107; Porter v. The New England, 17 Mo. 290; The Zenobia, 1 Abb. Adm. 80, Fed. Cas. No. 18,209; Williams v. Vanderbilt, 28 N. Y. 217.

<sup>92</sup> Sedg. Dam. § 862.

<sup>93</sup> Le Blanche v. Railway Co., 1 C. P. Div. 286.

<sup>94</sup> Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Pennsylvania R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89; carrying beyond Trigg v. Railway Co., 74 Mo. 147.

<sup>95</sup> Hamilton v. Railroad Co., 53 N. Y. 25.

<sup>96</sup> Indianapolis, B. & W. Ry. Co. v. Birney, 71 Ill. 391; Pennsylvania R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89; Francis v. Transfer Co., 5 Mo. App. 7; Hamilton v. Railroad Co., 53 N. Y. 25.

<sup>97</sup> Hanson v. Railway Co., 62 Me. 84; Yates v. Railroad Co., 67 N. Y. 100. See, also, cases cited infra, notes 103, 104.

<sup>98</sup> Lake Erie & W. R. Co. v. Fix, 88 Ind. 381; Kansas City, M. & B. R. Co. v. Riley, 68 Miss. 765, 9 South. 443; MacKay v. Railroad Co., 84 W. Va. 65, 11 S. E. 737; Murdock v. Railroad Co., 137 Mass. 293; Hufford v. Railroad Co., 64 Mich. 631, 31 N. W. 544; Id., 53 Mich. 118, 18 N. W. 580; Yorton v. Railroad Co., 54 Wis. 234, 11 N. W. 482; Id., 62 Wis. 367, 21 N. W. 516. But if by mutual mistake, or by fault of the passenger, his ticket is one which does not entitle him to passage, he may properly be ejected, even though he may

such a case. What are the natural and probable consequences of such a wrong? This must be answered with a view to the nature of the wrong and the time it was committed. It has been contended that the only natural and legitimate result of selling plaintiff a wrong ticket, or depriving him of a proper one, is to compel him to pay his fare a second time; and that he commits a breach of social duty in failing to protect himself thus, at trifling expense, from the consequences of the fault or mistake of the carrier's servant.<sup>99</sup> If he does so, the amount paid, with interest, furnishes the measure of damages. But we apprehend that he is not compelled to do so. He may elect to leave the train, and in that case may recover not only the amount of the additional fare which he is subsequently obliged to pay in order to reach his destination, but all damages sustained by him as a direct and natural consequence of the ejection.<sup>100</sup> The reason for this is that the rule of avoidable consequences does not require one to anticipate a wrong, and to take steps to avoid its consequences, before it is committed. He is entitled to presume that no wrong will be committed. The rule merely requires one who has been already injured to use all reasonable means to make the loss as light as possible. Whether it is a passenger's duty, therefore, to pay his fare a second time, and thus avoid ejection, depends upon when the wrong or breach of duty is committed. This is clearly at the time the ejection takes place. Where the action is for the breach of the contract or duty to carry, this is obviously true. But it is equally true where the action is founded on the neglect or mistake of the carrier's servant in regard to the passenger's ticket. In such case the wrong is not committed until the neglect has resulted in damage; that is to say, until the passenger has been expelled from the train. Negligence without damage is not a wrong.

As between the passenger and the conductor who ejects him the

have a right of action against the carrier for selling him an improper ticket. *Yorton v. Railway Co.*, 54 Wis. 234, 11 N. W. 482; *Id.*, 62 Wis. 367, 21 N. W. 516; *Bradshaw v. Railroad Co.*, 135 Mass. 407; *Frederick v. Railroad Co.*, 37 Mich. 342.

<sup>99</sup> *Yorton v. Railway Co.*, 62 Wis. 367, 21 N. W. 516; 2 Sedg. Dam. § 865.

<sup>100</sup> *Yorton v. Railway Co.*, 62 Wis. 367, 371, 21 N. W. 516.

ticket is conclusive evidence as to the passenger's right of passage.<sup>101</sup> If the passenger has not a proper ticket, the conductor may eject him,<sup>102</sup> and, though the carrier is liable for such ejection because it is a natural and probable consequence of the negligence of a prior servant in not furnishing the passenger with a proper ticket, he is not liable for exemplary damages, where the conductor acts considerately in making the ejection.<sup>103</sup> It is generally held, however, that a passenger may recover compensatory damages for mental suffering arising from the indignity of being expelled from a train, even though the conductor acted considerately.<sup>104</sup>

*End. Thars March 6th*

<sup>101</sup> See ante, p. 510.

<sup>102</sup> "If a passenger pay a railroad agent fare for a certain trip, and by mistake of the agent is given a ticket not answering for that trip, but one in an opposite direction, and the conductor refuses to recognize such ticket, and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be ground of action against the company as for a tort; but the action may and must be based on the breach of contract to convey the passenger." *MacKay v. Railroad Co.*, 34 W. Va. 65, 11 S. E. 737.

<sup>103</sup> *Fitzgerald v. Railroad Co.*, 50 Iowa, 79; *Philadelphia, W. & B. R. Co., v. Hoeflich*, 62 Md. 300; *Logan v. Railroad Co.*, 77 Mo. 663; *Hamilton v. Railroad Co.*, 53 N. Y. 25; *Yates v. Railroad Co.*, 67 N. Y. 100; *Tomlinson v. Railroad Co.*, 107 N. C. 327, 12 S. E. 138.

<sup>104</sup> *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364; *Chicago & N. W. Ry. Co. v. Williams*, 55 Ill. 185; *Chicago & N. W. Ry. Co. v. Chisholm*, 79 Ill. 584; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; *Lake Erie & W. Ry. Co. v. Fix*, 88 Ind. 381; *Shepard v. Railway Co.*, 77 Iowa, 54, 41 N. W. 564; *Carsten v. Railroad Co.*, 44 Minn. 454, 47 N. W. 49; *Hamilton v. Railroad Co.*, 53 N. Y. 25; *Stutz v. Railroad Co.*, 73 Wis. 147, 40 N. W. 653; 2 Sedg. Dam. § 865. It has been held that, where the conductor acts considerately, the plaintiff should have felt no sense of insult, and therefore cannot recover damages for the indignity. *Paine v. Railroad Co.*, 45 Iowa, 569; *Fitzgerald v. Railroad Co.*, 50 Iowa, 79; *Batterson v. Railway Co.*, 49 Mich. 184, 13 N. W. 508. Such is not the general rule.





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